United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 17 1964

Nathan J. Paulson
CLERK

No. 18,686

VINCENT J. DALY,

Appellant

v.

THE UNITED STATES OF AMERICA

Appellee.

837

APPEAL FROM A FINAL JUDGMENT
OF CONVICTION IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

John J. Dwyer and
Jean F. Dwyer, for

DWYER & DWYER

602 Fifth Street, N.W.
Washington 1, D.C.

Counsel for Appellant

1

STATEMENT OF QUESTIONS PRESENTED

I

(a) The question is whether, in an indictment of 27 counts (5 felonies, 22 misdemeanors), covering a period of 30 months, and naming more than a dozen complaining witnesses, but not alleging a common scheme or conspiracy, the Court did not err in denying Appellant's timely motion for a severance or to compel the Government to elect.

(b) The question is whether the Court did not err in denying appellant's timely motion for a subpoena duces tecum against the Department of Justice to determine the prior criminal records, if any, of the complaining witnesses, since most of them were not local residents, and their records, therefore, would not be available through the Metropolitan Police Department.

II

The question is whether the Court did not err in its limitations on Counsel for Appellant during cross examination of Government witnesses, when counsel was seeking to bring out prior inconsistent testimony or statements by those witnesses.

III

The question is whether the Court did not err in denying appellant's motion for a judgment of acquittal as to certain counts of the indictment, either because the complainants denied that appellant had made the statements which the indictment accused him of making; or because there was

no evidence that appellant had committed the act charged in the specific counts; or because the prosecution failed to prove an essential element of the crime charged.

IV

The question was whether the Trial Judge, in extensive questioning of the witnesses, often leading, and in allowing the prosecution latitude in cross examination denied to Appellant's counsel, and in taking certain aspects of the case from the jury, did not go beyond the bounds permissable to the presiding Judge, and deprive Appellant of a fair trial.

V

The question is whether the Trial Judge did not err in denying Appellant's motion for a mistrial, caused by the prosecution's introduction of a totally inadmissable, but highly damaging piece of evidence.

VI

The question is whether the Trial Judge did not err in admitting into evidence under the "Shop Book Rule" certain documents, which appellant contends do not qualify under that Rule because they were incomplete, contained hearsay, were not relevant, or for other reasons.

VII

The question is whether the Trial Judge did not err in repeatedly declining to admit evidence proffered by the Appellant, going to prove pattern and habit, e.g. the testimony of dozens of patients that he had never, in fact, made any misrepresentations to them, or administered medication, or otherwise committed any of the violations with which he is charged.

VIII

The question is whether the Trial Judge did not err in declining to make known to counsel for Appellant the contents of the probation report upon timely request, especially when appellant submitted a documentary report giving extensive reasons why he anticipated inaccuracies in that report; and whether he did not, by such a refusal, deprive appellant of his right of allocution.

INDEX

TABLE OF CASES

INDEX (Continued)

** Cases chiefly relied upon are marked with asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,686

VINCENT J. DALY,

Appellant

v.

THE UNITED STATES OF AMERICA,

Appellee.

Appeal from a Final Judgment of Conviction in the United States District Court for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a final order of the United States District Court for the District of Columbia. The jurisdiction of this Court is invoked under Section 2191, Title 28, United States Code. The judgment appealed from is a final judgment within the meaning of the aforesaid statutory provision. An

appeal was duly noted and perfected within the time limitations provided by the applicable statutes and Rules of this Court.

STATEMENT OF THE CASE

On May 1, 1963, officers of the Metropolitan Police Department entered the premises of the Appellant, at 3221 Conn. Ave., N.W., Washington, D.C., armed with a search warrant for the premises, and arrest warrants for the Appellant and for his secretary, Miss Edwina Hallman (Tr. 454 et seq.). They seized from the premises all Appellant's certificates and photographs from the walls, medications, and other material, some of which was subsequently introduced into evidence.

Among the exhibits so seized and introduced was a certificate awarding appellant ScD in Urbiculture, a certificate from Huntington Hospital commending his service there, a certificate making him a fellow in the American Association for Social Psychiatry (an organization which numbered among its members James Bennett, Dr. Manfred Guttmacher, Judge Alfred Noyes and many others of like calibre Tr. 567), a certificate of membership in the Association of Military Surgeons, and a certificate from Sir Guys. Significantly, the prosecution at the trial sought to impeach only one of all the exhibits seized - the Sir Guys Certificate, with an affidavit (discussed at length in Point VI) from a Guys Hospital.

In addition, all the files of the appellant were seized, and it appears that the subsequent three months were spent by the police in contacting as many as possible of the 250-300 people mentioned therein. Of this number, one former mental patient, one couple, and one other woman were found who would testify at the trial (the Sokols and the Athanas' contacted the police, not vice versa) that appellant had made any misrepresentations to them.

Three months later, on July 29, a Federal Grand Jury returned a 27-count indictment against Appellant (the charges against Miss Hallman were

ignored). The indictment included 5 counts of false pretenses, under the felony provision; (1) allegedly committed in 1961 against Mrs. Wanda Athanas; (2) 1962-63 against Col. and Mrs. Edward L. Bale, Jr.; (3) 1962-63, against Mrs. E. H. Nelson; (4) 1963, against Vincent Shermerhorn; and (5) 1963 against Mr. and Mrs. Stephan J. Sokol. The succeeding 22 counts all charged various misdemeanor violations, under the healing arts and dangerous drug statutes. A timely motion for severance was made and denied, as was a motion for a change of venue, because of the publicity given the case by the Evening and Sunday Star; and a motion for information relating to the criminal records of various complaining witnesses.

At the trial, the Government by its own motion dismissed 6 counts (8, 13, 20, 21, 22, 23); at the close of the Government's evidence, it dismissed two further counts (14, 18). The Court upon motion of Appellant's counsel dismissed four more counts (1, 9, 11, 16). The case was submitted to the jury on 15 counts, and a conviction was had on all of them.

The attempt to provide this Court with the "concise statement of the case" required by the Rules of this Court will doubtless, in itself, make it clear to the Court the difficulties of the trial.

The first witness, a Dr. Yates, testified to a matter relevant to count 14, which was dismissed by the Government at the close of the evidence.

The next witness, Mrs. Wanda Athanas, testified in connection with counts 1, 6, and 7, and said, in pertinent part that she had been referred to Appellant because of difficulties her son was having in school (Tr. 69); that she consulted Appellant, and arranged for the son, James, to come to him, for a fee of $40.00 a month, to cover a minimum of 8 appointments a month (Tr. 76). She testified that she was referred to Appellant by a psychological association (Tr. 80); she testified that at no time had Appellant represented himself as a medical doctor (Tr. 82); then later said he had, in fact so represented himself (Tr. 84). The only testimony relevant to count 6 (healing arts on James Athanas) was Mrs. Athanas' testimony

that Appellant had administered certain tests to her son (pp. 78-79), or had had them administered (Tr. 77-78); that Appellant referred them to a medical doctor for a physical examination (Tr. 110); that after a few sessions Appellant referred James to a Dr. Margaret Elliott, another psychologist (Tr. 114). She further testified that after this, she herself returned to Appellant for counselling, at the insistence of her husband, at which time, she claimed, he gave her pills and a shot (Tr. 91). No physical evidence was produced as to this allegation. The Court dismissed Count 1; the jury convicted as to 6 and 7.

Lewis Athanas, husband of Mrs. Athanas, testified, but did not allege that Appellant had at any time represented himself as either a physician or psychiatrist.

The next witness, Mrs. Esther Nelson, testified that her husband (who never testified at the trial) made an appointment with Appellant, to consult him about difficulties with their son (counts 3, 11, 12); that they both went to Appellant's office (Tr. 153); that they examined certificates on the wall, including one from a university at "Bern, Switzerland", but made no claim of seeing any diplomas, licenses, etc. (Interestingly enough, although a number of Government witnesses claimed to have seen the "Bern" certificate, it was the only item missing among those seized by the police; all defense witnesses denied it ever existed; and the Government who claimed to have seen it testified, variously, that it was in English, German, Latin, or a combination). Mrs. Nelson claimed that Appellant, in answer to her question had told her he was an M.D. and a psychiatrist (Tr. 155-6); that on one occasion he had given her pills (Tr. 164-5), which were not, however, produced in Court; that she had had "pre-medics in college" (Tr. 165) and had worked in 3 different doctors' offices (Tr. 178); that she paid Appellant a total of $270.00 for 5 months of consultations, twice a week; (Tr. 174) totalling 140 hours (Tr. 205); that she had been supplied with a copy of "Christ and Mental Health" (which contains an introduction, plus a specific statement by Appellant that he is a psychologist); that she read the intro-

duction (Tr. 176); that she didn't read the introduction (Tr. 177). She also testified that at no time had she seen Appellant using "M.D." after his name; that when she had a medical problem, Appellant referred her to the Washington Clinic (Tr. 184); she denied having discussed Appellant's qualifications with Rev. Lloyd Goodrich (cf. pp. 512-514). She admitted that she had not mentioned the "Bern" certificate before the Grand Jury, although she was asked about certificates (Tr. 203-4) The Court granted a judgment of acquittal on count 11.

The testimony of Mrs. Sybil Bales was similar to that of Mrs. Nelson, including the admission to having read the introduction (Tr. 233) and then a denial (Tr. 234) to "Christ and Mental Health". Her testimony was that her son was going in for a total of about 48 hours a month, for which they were paying $60.00 a month (Tr. 245). She claimed to have seen the "Bern" certificate also, but according to her it was from a hospital,not a university (Tr. 255).

However, despite the attempts of the Court to lead her into making the required statutory responses, it was ultimately clear, after cross examination, that the appellant had not, in fact, made the representations to the witness that the indictment charged he had made. And it was equally clear, when the witness responded affirmatively to the Court's leading questions, she had not been testifying either correctly or fully.

Col. Bales, her husband, testified that Appellant had not, to his recollection, made a direct claim to being an M.D. or a psychiatrist (Tr. 266-7 & 283); he too testified about the Bern certificate, which was, he claimed, in English and Latin (Tr. 280); this witness also made a claim corroborated by no other witness for either side - that there were two "Sir Guy" certificates as well (Tr. 282); he also admitted that the treatment consisted primarily of tutoring by Miss Hallman (Tr. 284). The Court entered a judgment of acquittal as to Count 9, on the Bale group.

The next witness, Zaviola Sokol, was involved in, or testified regarding counts 5, 16, 17, 24, 25, 26, 27. According to her, Appellant, at his first

interview with her and her husband represented himself to be a psychiatrist and an M.D. (Tr. 302), although she admitted on cross examination, that at the time of the preliminary hearing some months earlier, she had specifically denied ever hearing him make such representations (Tr. 327-28), claiming her failure to make this allegation was because of counsel's interruptions, although the denial came during direct examination, uninterrupted by so much as an objection. This witness had a prior felony conviction in New York, apparently for taking allotment checks; however, the Court declined to allow Appellant's counsel to cross examine her about earlier, contrary statements about a conviction (Tr. 349-350).

In contrast, Mrs. Sokol's husband testified that at no time did App. specifically represent himself as either a psychiatrist or an M.D. (Tr. 369-70).

Vincent Shermerhorn (counts 4, 15), testified that he had been in and out of mental hospitals, and under psychiatric care off and on since the 1930's (Tr. 381). He testified at some length as to his alleged conversation with App., and concluded by making arrangements for 6 appointments a week, for a total of $50.00 (he had been referred to App. by a Dr. London, a well-known analyst in the District) (Tr. 381-388). This witness also mentions, or so it would appear, the "Bern" certificate; he described it as setting forth that App. had spent 9 years there, in the "Faculiti Berni" (Tr. 385). He admitted on cross examination that he did not recall seeing any certificates other than those introduced by the Government (Tr. 393), and that none of them stated that Appellant was a psychiatrist. The Court declined to allow counsel to inquire on cross examination what the witness was accustomed to pay for the psychiatric care he had had in the past (Tr. 394). This witness admitting to taking drugs "off and on" (Tr. 401); and identified a prescription bottle as one App. took from him, the prescription having been for a "William Bressler" (Tr. 403-4).

Following this, the Government introduced certain documents, over counsel's objection (Tr. 411-12). They included a certificate from Christ

College of Oxford University, over objection (Tr. 426), that the records had been searched, but with no record of the Appellant; a certificate from the Superintendent of Guy's Hospital, London, England (over objection) which not only set forth a search of the record, but admitted they were incomplete, and included a statement by the affiant himself as to his own recollection, or lack of it (Tr. 429). There was a further certificate from one Dr. V. Moine, President of the Canton of Bern, Switzerland, although it does not appear that he was the custodian of the records for the University (Tr. 430).

The balance of the evidence consisted of testimony that App. was not licensed as a physician in the District of Columbia, but that Dr. Frank Fagan, who shared his office was (Tr. 436-7); that there was no record of a passport application in the name of Appellant (Tr. 439), but that a minor or juvenile may travel on his parent's passport (Tr. 442). (This was accompanied by an exchange between counsel and the Court during which the Court in the presence of the jury debated certain points with counsel, and attempted to make him, in effect, make a proffer of defense testimony; Tr. 440-450.) In addition, there was testimony from a Sgt. Panetta as to the execution of the search warrant, the seizure of certain drugs from the premises, and a stipulation that some of the seized drugs were within the purview of the dangerous drug act. Following this the Government rested, after having dismissed counts 14 and 18.

On motion by counsel, the Court dismissed counts 1 (false pretenses against Wanda Athanas), 9 (healing arts on Charles J. Bale), 11 (healing arts on Daniel J. Nelson), and 16 (healing arts on Vida Zoe Sokol). All other motions were renewed and denied.

The defense brought to the stand over two dozen rebuttal witnesses (and proffered more to the Court); these testified about many things, but the common tie was that they all were willing, but not permitted by the Court, to testify that they had been in consultation with the Appellant for varying periods of time; were familiar with his office and methods; and that he had

never at any time represented himself to be either a medical doctor or a psychiatrist (Tr. 500-504; for individual rulings on the point, see. Tr. 515, 526, 539-42, 575, 578, 592, 619, 625, 630, 634, 639, 641, 645, 650, 671-2, 705, 715-16, 729-30, 740-41, 757, 760, 775). In addition, the Court also declined to allow counsel to bring out testimony concerning Appellant's work with the Jewish faith, in an attempt to avert possible prejudice resulting from material volunteered by a Government witness (cf. Tr. 397, and Tr. 730). The Court also refused to allow counsel to recall Dr. Gordden Link to the stand, to explain an apparent discrepency in his testimony for the defense, after the discrepency had been brought out by Government counsel (Tr. 811-12).

Among the testimony to be admitted was that of Father Lloyd Goodrich (former curate to the late President Roosevelt), that he had discussed Appellant with the Nelsons (Tr. 512-13); and of a local dentist, Dr. Christopher Photakis (Tr. 525) who had discussed him with Mrs. Athanas. Dr. Melchior Savarese, M.D., a local physician, specializing in obstetrics and gynecology, testified, among other things, that, in his opinion, Appellant had more clinical experience than most of the men actually in the psychiatric field in Washington (Tr. 554). This witness was also subjected to an extensive cross examination by the presiding judge (Tr. 554-562), which terminated in an exchange, again before the jury, between counsel and the Court (Tr. 561-2).

There was testimony by another local physician, Dr. Edward Mazique, who testified that he had supplied Appellant with physicians samples for the purpose of their being shipped to a hospital in Africa (Tr. 662), on two separate occasions (664). He further testified that he had referred patients to Appellant for psychological testing and treatment, and had received referrals from him for medical treatment (662).

There was testimony from a Mrs. Martha Lou Parker that she was familiar with various ads, letters, and other material (all of which make it

clear that Appellant represented himself only as a psychologist), and that she had, on occasion, while they were coming to the office, discussed this material with both Mrs. Sokol and Mrs. Athanas (Tr. 582-84). This witness was one of many who was familiar with the office, and denied that the "Bern" certificate had ever existed (Tr. 585 & 670). She and the subsequent witness, among others, described the office in some detail (Tr. 584-5, and 592), the equipment of which included not medical paraphenalia, but such things as a loom, an organ, a coffee pot, and, of course, the office cat (Tr. 667-68).

Still another witness testified that she had discussed the aforementioned material with Mrs. Bales, Mrs. Sokol and others (Tr. 676); and that she had been present on one occasion when Mrs. Sokol was going through the box of samples (App. was not present) and removed certain of its contents (Tr. 678). The Court excluded certain proffered testimony by this witness to the effect that Appellant had called the Narcotics Squad on one or more occasions (specifically within two weeks of his arrest), because of a patient, and that the police at that time had actually seen the box of samples sitting openly in the waiting room (Tr. 679-80).

It was during the cross examination of Dr. Link, another defense witness, that the incident occurred which led to the motion for a mistrial. The prosecutor, without showing the paper to the defense, or making any proffer of proof on it, (e.g., that the appellant knew, or had instigated the appearance of the reference in the publication), put a question to the witness. He could not have failed to anticipate the answer, which was in effect, that the publication referred to the appellant as "Vincent J. Daly, M.D." (Tr. 799-800), coupled with a denial that he (the witness) had any connection with this publication. It is impossible to calculate the effect of this on the jury, especially since it was the sole piece of written or substantive evidence to corroborate the claims of the various prosecution witnesses.

The appellant was convicted on all the counts submitted to the jury, a total of fifteen. Prior to his sentence, request was made for either the probation report or a summary; this request was supported by considerable data indicating that various records and other material relating to the appellant was incomplete or inaccurate. Because of this, appellant was concerned that the information supplied the Court might also be incorrect. However, at no time was this request granted even in part (Supp. Tr. pp. 2, 3).

STATUTES AND RULES INVOLVED

DISTRICT OF COLUMBIA CODE, ANN., 1961 Ed.:

Title 22, Section 1301 (Vol. 2, p. 947): "Whoever, by any false pretense, with intent to defraud, obtains from any person anything of value. . . shall, if the value of the property or the sum or value of the money or property so obtained, procured, sold, bartered, or disposed of is $100 or upward, be imprisoned not less than one year nor more than three years. . ."

Title 2, Section 102 (Vol. 1, p. 152): "No person shall practice the healing art in the District of Columbia who is not (a) licensed so as to do, or (b) if exempted from licensure under sections 2-133 or 2-134, then duly registered.

"No person shall practice the healing art in the District of Columbia otherwise than in accordance with the terms of his license, or of his registration, as the case may be."

Title 33, Section 702 (a)(1): (Vol. 2, p. 1438): "Except as otherwise provided by sections 33-703 and 33-704, the following acts, the failure to act as hereinafter set forth, and the causing of any such act or failure are hereby declared unlawful: (1) The delivery of any dangerous drug. . ." and (4) "The possession of a dangerous drug by any person, unless such person obtained such drug on the prescription of a practitioner or in accordance with subparagraph (D) of paragraph (1) of 1 this subsection."

RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, as amended May 1, 1956:

Rule 8(a): JOINDER OF OFFENSES. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Rule 14: RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Rule 27: PROOF OF OFFICIAL RECORD. An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions. (See Rule 44, Federal Rules of Civil Procedure.)

CONSTITUTION OF THE UNITED STATES, Amendment VI: "In all criminal prosecution's the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF POINTS

I

(a) The appellant contends that the Court erred in denying his timely motion for a severance of counts, or to compel the Government to elect: the indictment was in 27 counts (5 felonies and 2 misdemeanors), most of which bore no relation to each other. The Appellant was prejudiced by this joinder, since most of the Government witnesses were so weak and uncertain, that it appears that only the support that each gave the other caused his conviction on all counts which were submitted to the jury.

(b) The appellant contends that the Court erred in denying his motion for a subpoena duces tecum against the Department of Justice in order to discover whether any of the complaining witnesses had a prior criminal record, when most of the witnesses were not local residents; when at least one admittedly had a felony conviction, and another was an admitted drug user.

II

The appellant contends that the Court erred in limiting his counsel on cross examination of witnesses, when counsel sought to bring out prior inconsistent statements, or otherwise impeach those witnesses.

III

The appellant contends that the Court erred in submitting certain counts to the jury, when the Government had failed to prove one or another of the essential elements; as to count 6, there was, literally no proof that the appellant had treated the named complainant (who did not testify); as to counts 7, 10, 15, 17, alleging violations of the healing arts act, there was no testimony and no physical evidence that the pills allegedly given (if there were any) were of a nature to bring this within the purview of the act; and as to counts 19, 24, and 25, the testimony of a licensed physician made it clear that appellant's possession of these drugs come within the statutory exemption: as to counts 2, 4, and 5, prosecution witnesses denied he made the misrepresentations the indictment charges him with making to them.

IV

The appellant contends that the trial Judge exceeded the bounds allowed to the Court in frequent, consistent leading questions and cross examination of witnesses, exchanges with counsel in open Court before the jury, and the limitations imposed on defense counsel in cross examination and in proffer of defense testimony.

V

The appellant contends that the Court erred in not granting the motion for a mistrial made when the following incident occurred: during the Government's cross examination of a defense witness, Government counsel produced a document, not previously shown to defense counsel, and whose contents were completely unfamiliar to defense counsel, and elicited the information that the document at some point contained the listing "Vincent J. Daly, M.D."; at no time was there any offer of evidence by the Government that this document was known to the appellant, or that he had either solicited or authorized such a listing.

VI

The appellant contends that the Court erred in admitting into evidence, purportedly under the Federal Shop Book Rule, certain documents setting forth the search of certain records, and the failure to find the records (about appellant) requested; and also containing statements as to the writer's own recollection of the situation. Appellant contends this was error because the writers of the objectionable documents were not present in Court, and there was no opportunity to examine them, especially as to the "recollection" portions of the documents: and also because the documents were, in some cases, not shown to be relevant; or were incomplete.

VII

The appellant contends that the Court erred in declining repeated proffers of evidence that almost all of the appellant's patients would testify that at no time had he represented to him, or to anyone in their hearing that he was a psychiatrist or an M.D.; nor had he ever administered or given them any medication in violation of the statute. Appellant contends this was doubly prejudicial because of the joinder of the many transactions.

VIII

The appellant contends that the Court erred in declining to make the probation report, or a summary of its contents available to counsel upon request. This made it impossible for appellant to rebut any detrimental material contained therein, or to supply such data as would give the Court a complete picture upon which to impose sentence. He submits that this was particularly true when he had submitted extensive information to the Court indicating that a great deal of incomplete or erroneous information was in circulation about him.

SUMMARY OF ARGUMENT

I

(a) The appellant contends that one of the most serious of the errors was the failure of the Court to grant his timely motion to sever the indictment because of prejudicial joinder. As may be seen from the Statement of the Case (supra, pp. 2), the indictment joined a number of offenses in no way connected with each other, as to time, or complainants. A careful examination of the evidence makes it clear that, almost without exception, the testimony as to the individual counts was contradictory, inconsistent, and, in some instances (e.g. count 6) non-existent, and it was only the support rendered by the great number that resulted in appellant's conviction. It was clear that the jury did not discriminate between them, as the verdict of guilty was returned as to all counts submitted to the jury.

(b) The appellant contends that the Court erred in failing to direct the Department of Justice to make available to him the criminal records of the complaining witnesses, if any. Most of the witnesses were not local residents, so that the Metropolitan Police Records were of no assistance on this point.

At least one Government witness, Mrs. Sokol, had a prior felony conviction, and at least one other one was, or had been a narcotics user. Since the convictions depended in each case almost entirely on the unsupported word of one witness, this test of credibility was doubly important, and its lack more keenly felt.

II

The appellant contends that the Court erred in the limitations imposed upon counsel in his attempts to cross examine Government witnesses. This would be prejudicial in any case, but was, appellant says, particularly so in view of the Court's frequent and often extensive examination of witnesses, and in view of the fact just mentioned, that on almost every count the appellant's conviction rested on the unsupported testimony of one witness.

III

The appellant contends that the Court erred in denying counsel's motion for a judgment of acquittal at the close of the Government evidence, or at the close of all of the evidence on the following counts: Counts 2, 4, and 5, the prosecution witnesses all admitted that the appellant did not make the misrepresentations which the indictment charges him with making; i.e., that he was a medical doctor and a psychiatrist. Count 6, healing arts on James Athanas: this was one of four counts charging violations of the healing arts statute as to the incorrigible children of various complainants: a judgment of acquittal was entered for each of the others, but denied on this one, although the evidence was clear that appellant, after testing the boy referred him to another psychologist for treatment. Counts 10, 12, 15 and 17 each charge violations of the healing arts statute as a result of appellant's allegedly administering medication to various complainants. In no instance was this corroborated, nor were any of the medications introduced in Court, nor

any evidence as to what, if anything they were. Counts 19, 24, and 25, alleged possession of certain dangerous drugs. At the close of the Government's case, the state of the proof was that the offices from which the samples which were the corpus of these counts came were occupied by appellant, and by a licensed medical doctor; at the close of all the evidence, the proof was that the samples in question had been given to the appellant by a duly licensed medical doctor, and thus came within the statutory exemption. Further, counts 24, 25, 26 and 27, charging four separate offenses, under the evidence (the witness testified she received them all at once) clearly merged, being the subject of a single transaction.

IV

The appellant contends that the frequent intervention of the Court, in making comments, cross-examining Defendant witnesses and leading government witnesses, and in applying what at least appears to be a differerent standard in ruling on Government and defense proffers of evidence, and in the limits imposed on cross examination by defense counsel, overstepped the bounds permitted to the presiding Judge, and prejudiced the defense.

V

The appellant contends that the Court's denial of a motion for a mistrial, coupled with the failure even to instruct the jury to disregard the incident involving the publication in which the phrase "Vincent J. Daly, M.D." appeared was, in light of the entire state of the evidence, highly prejudicial to the appellant.

VI

The appellant contends that admitting into evidence the documents sent over from England and Switzerland, which contain, in addition to normal records kept (or not kept) in the course of business, matters of personal recollection, constituting hearsay, was error. Since these were merely documents under seal, not produced personally by their makers, it was impossible for

counsel to impeach their accuracy, and, more particularly, to inquire into those matters of recollection which obviously were not entries in the regular course of business.

VII

The appellant contends that he was fatally prejudiced by the ruling of the Court that evidence tending to prove habit or pattern would not be admitted. He was faced with a voluminous indictment, in which many disconnected counts nevertheless supported each other; he was not allowed to show by any testimony that the vast majority of his patients had never heard him make any such misrepresentations as those charged; or that he had frequently (on one occasion during a radio broadcast) repudiated the suggestion that he was either a psychiatrist or a medical doctor.

VIII

The appellant contends that he was deprived of his right of allocution at the time of the imposition of sentence by the Court's refusal to allow counsel, upon request, to examine the probation report, or to make the substance of it known to him. He received the maximum sentence possible under one felony count (1 to three years), although the sentences run concurrently by the counts. It is impossible to gauge the extent of the influence of this report, since its contents are unknown, but he was deprived of the opportunity to rebut its contents in any way, or to supplement them, should the report be incomplete or inaccurate. Further, the record is clear that, before sentencing, he had submitted considerable information to the Court indicating that, in all probability the information contained in that report would be both incomplete and inaccurate.

ARGUMENT

I(a)

The denial of the motion to sever: Following the indictment in this case, a number of pre-trial motions were made, important among them a motion to sever the counts of the indictment, or to compel the Government to elect.

As was noted, the indictment was originally returned in 27 counts, including five felonies(all separate and distinct false pretense charges) and 22 misdemeanors, including violations of the healing arts statute, of possession of dangerous drugs, and of administering dangerous drugs. There was little relationship among these counts; some of them referred to the same complainants (e.g. Athanas, either mother or son was named in counts 1, 3, and 6; the Sokols named in counts 5, 16, 17, 24-27). But it was nowhere alleged in the indictment, or shown in the evidence that any of these incidents had any connection with any of the others, or that any of the prosecution witnesses, prior to the arrest, had any connection each with the other. In short, the joinder served one purpose only: to buttress a large number of essentially weak counts.

To properly appreciate the extent of this prejudice, it is necessary to consider the happenings at the trial itself: At the time of the trial, the Government introduced into evidence a number of certificates and other documents seized from the appellant's office at the time of his arrest, and the defense offered another collection of documents and written material. Not one of these items represents the appellant as being other than what he admits holding himself out as being: a psychologist. Among the items included (and admittedly read by most of the Government witnesses) is a pamphlet entitled "Christ and Mental Health", written by the appellant. It specifies in a foreword written by Cardinal Stritch, as well as in one by Dr. Gordden Link (one of the defense witnesses), and in the article itself that Appellant is a

psychologist. All of the complainants claimed to be familiar with and, indeed knowledgeable about the workings of psychiatrists v. psychologists. (One claimed to have been a pre-medical student, another to have been employed by a number of physicians, another had been in and out of mental institutions and under extensive psychiatric care since the 1930's.) For the most part, the fees they paid averaged out to $15, $1.50 to $2.00 an hour, although none of them claimed to be charity cases (all the children were in private schools).

It would take an intensive, almost minute, examination of the transcript to disclose all of the discrepencies in their testimony: among the more conspicuous is that of Mrs. Sokol, who testified (tr. 302) "And he went into detail explaining to my husband that he was also not only a psychiatrist but a doctor. And I at that time asked him if there was any medical part to be done to my daughter that he would refer the medical end of it to my pediatrician...", but admitted on cross examination that on preliminary hearing she had said no such thing; that he had, in fact, never claimed to be either a psychiatrist or an M.D. and that all the certificates she saw specified that he was a psychologist. This is carried even further by the testimony of her husband, whose sole testimony on this point is found in the following exchange (tr. 369-370): "And I think perhaps that somewhere in this early part of the conversation when I mentioned that the principal had recommended him as a very - as a child psychiatrist, he said, "Do you know--' Dr. Daly said, "Do you know what a Doctor of Psychiatry is?' I said, 'Yes, I know' 'Then you do know he is a Doctor of Medicine.' I said, 'Yes, I do.'"

The transcript is replete with contradictions, and weaknesses, each of which, had the count been tried alone, sufficient to make it doubtful the jury would have seen that count; the harm lay in the accumulation of testimony. Indeed, a careful study of the trial transcript finds the harm of that accumulation making itself seen in the attitude of the Court itself. When listening to the first witness, Mrs. Athanas, the Court was obviously incredulous (tr. 94-98) and, indicated that her testimony did not constitute sufficient evidence for

false pretenses even before cross examination began (tr. 102). However, as the prosecution witnesses began to pile up, the attitude of the Court itself apparently underwent a change, although a comparison of Mrs. Athanas' testimony with that of subsequent witnesses does not show a variance in content that would account for this (tr. 490-494). It can, in short be accounted for only on the prejudice resulting from the accumulation of many witnesses. If this has such an effect on a Judge who not only has been on the Federal bench for many years, but was an active U. S. Attorney before that, what must the effect have been on a lay jury?

It might be a trifle clearer from an examination of the Schermerhorn incident (tr. 491). Schermerhorn was the self-confessed, long-time mental patient and drug user, who was referred to Daly by an experienced and reputable psychiatrist. His impression on the Court was quote: "I wasn't impressed with him either." But when the Government reminded him of similar testimony from another, unrelated, witness, the Court reversed its stand, and let the counts remain.

The danger of this type of joinder has long been recognized by the Courts. It was recognized by this Court in Kidwell v. U. S., 38 App. D. C. 566 in 1912, when it said: "It is doubtful whether separate and distinct felonies, involving different parties, not arising out of the same transaction or dependent upon the same proof, should ever be consolidated. But it should not be permitted where the crimes charged are of such a nature that the jury might regard one as corroborative of the other, when, in fact, no corroboration exists." (emphasis added). If this were true of Kidwell, in referring to two counts of carnal knowledge, involving two different complainants, and occurring some 6 months apart, how much more application does it have in the instant case, involving many counts, over a dozen complainants, and a period of time ranging from January, 1961 until April, 1963?

Certainly the facts in this case take it well beyond Kidwell (and, more recently, perhaps, the Drew[1] and Cross[2] cases), and even, counsel contends, beyond such cases as McElroy v. U.S., 164 U.S. 76, at 79-80, in which the Supreme Court said, in part, "In cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise, that it is the settled rule in England and in many of our States, to confine the indictment to one distinct offense or to restrict the evidence to one transaction." (cases cited) "...we do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence, and in no sense resulting from the same series of acts." Even McElroy involved the joinder of only a few felonies, and those committed within two weeks of each other, although admittedly the crimes therein were more serious than these; the prejudice, however, it is contended is no less serious.

The discussion in the Drew opinion (supra, note 1) seems so applicable to the facts in this case, and the language so apt, that we will not attempt to quote all the relevant passages, for it would mean an almost verbatim printing of the entire opinion. Certainly the considerations which caused a reversal with an order to sever in Drew, however, are even more pressing here. Drew involved two counts; one of robbery, one of attempted robbery. This as finally submitted to the jury, involves 5 false pretense counts, 3 counts of possessing dangerous drugs, and 7 healing arts violation charges. Appellant contends that no one who reads the transcript can have any doubt that the prejudice the Court found existed against Drew because of the joinder of two counts, existed in this case, but multiplied many-fold because of the

---

1 Drew v. U.S., __U.S. App. D.C.__, __F.2d__(2-13-64).

2 Cross v. U.S., __U.S. App. D.C.__, __F.2d__(3-26-64).

false pretenses even before cross examination began (tr. 102). However, as the prosecution witnesses began to pile up, the attitude of the Court itself apparently underwent a change, although a comparison of Mrs. Athanas' testimony with that of subsequent witnesses does not show a variance in content that would account for this (tr. 490-494). It can, in short be accounted for only on the prejudice resulting from the accumulation of many witnesses. If this has such an effect on a Judge who not only has been on the Federal bench for many years, but was an active U. S. Attorney before that, what must the effect have been on a lay jury?

It might be a trifle clearer from an examination of the Schermerhorn incident (tr. 491). Schermerhorn was the self-confessed, long-time mental patient and drug user, who was referred to Daly by an experienced and reputable psychiatrist. His impression on the Court was quote: "I wasn't impressed with him either." But when the Government reminded him of similar testimony from another, unrelated, witness, the Court reversed its stand, and let the counts remain.

The danger of this type of joinder has long been recognized by the Courts. It was recognized by this Court in Kidwell v. U. S., 38 App. D. C. 566 in 1912, when it said: "It is doubtful whether separate and distinct felonies, involving different parties, not arising out of the same transaction or dependent upon the same proof, should ever be consolidated. But it should not be permitted where the crimes charged are of such a nature that the jury might regard one as corroborative of the other, when, in fact, no corroboration exists." (emphasis added). If this were true of Kidwell, in referring to two counts of carnal knowledge, involving two different complainants, and occurring some 6 months apart, how much more application does it have in the instant case, involving many counts, over a dozen complainants, and a period of time ranging from January, 1961 until April, 1963?

Certainly the facts in this case take it well beyond Kidwell (and, more recently, perhaps, the Drew[1] and Cross[2] cases), and even, counsel contends, beyond such cases as McElroy v. U.S., 164 U.S. 76, at 79-80, in which the Supreme Court said, in part, "In cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise, that it is the settled rule in England and in many of our States, to confine the indictment to one distinct offense or to restrict the evidence to one transaction." (cases cited) "...we do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence, and in no sense resulting from the same series of acts." Even McElroy involved the joinder of only a few felonies, and those committed within two weeks of each other, although admittedly the crimes therein were more serious than these; the prejudice, however, it is contended is no less serious.

The discussion in the Drew opinion (supra, note 1) seems so applicable to the facts in this case, and the language so apt, that we will not attempt to quote all the relevant passages, for it would mean an almost verbatim printing of the entire opinion. Certainly the considerations which caused a reversal with an order to sever in Drew, however, are even more pressing here. Drew involved two counts; one of robbery, one of attempted robbery. This as finally submitted to the jury, involves 5 false pretense counts, 3 counts of possessing dangerous drugs, and 7 healing arts violation charges. Appellant contends that no one who reads the transcript can have any doubt that the prejudice the Court found existed against Drew because of the joinder of two counts, existed in this case, but multiplied many-fold because of the

---

1 Drew v. U.S., __U.S. App. D.C.__, __F.2d__(2-13-64).

2 Cross v. U.S., __U.S. App. D.C.__, __F.2d__(3-26-64).

enormous and confusing number of counts, and of evidence introduced to support them. Certainly, if a case ever failed to measure up to the "simple and distinct" test mentioned by the Court (slip opinion, p. 14), the instant case is the one. There was nothing simple and distinct about any of these counts; and without the support each improperly lent the other, appellant contends that no conviction would have been had.

The cases where this Court has held joinder was not prejudicial are distinguishable on the facts. In some cases, the jury was obviously not confused, as they returned discriminating verdicts (e.g. Peckham V. U.S., 93 U.S. App. D. C. 136, 210 Fed. 2d 693, rev. on other grounds; Maurer v. U.S., 95 U.S. App. D.C. 389, 222 Fed. 2d 414 (1955); and Monroe, et al. v. U.S., 98 U.S. App. D. C. 228, 234 Fed. 2d 49 (cert. den. 352 U.S. 873); or the Court felt that the counts were so few and the evidence so clear as to be obviously non-prejudicial (e.g. Dunaway v. U.S., 92 U.S. App. D.C. 299, 205 Fed. 2d 23).

But where it appears that a defendant is prejudiced by the joinder of offenses not sufficiently related to each other, and especially where there is some possibility, as mentioned above, that the testimony on the various counts may be corroborative each of the other, this Court has consistently held the joinder improper (see Boyer v. U.S., 76 U.S. App. D.C. 397, 132 Fed. 2d 12, and Ward v. U.S., 110 U.S. App. D.C. 136, 289 Fed. 2d 877.)

Further, in each of these cases where joinder was held proper the Court had apparently charged the jury fully and carefully as to what evidence they might consider as to each count, and, in appropriate cases, on the importance of "compartmenting" so to speak, the evidence. An examination of the Court's charge here reveals no hint of such instructions. And to make the matter worse yet again, while the Government had the full benefit of the corroboration to be derived from its parade of witnesses testifying essentially to pattern, the defense was denied the opportunity for any effective rebuttal, as will be discussed more fully in section VII.

Briefly, appellant contends to the Court that this question alone is sufficient to justify a reversal of his conviction, together with an appropriate order as to any future trial or trials.

1(b)

Denial of motion for subpoena duces tecum to U.S. Attorney: Prior to the trial, the defense filed a motion asking for certain material to be made available to it prior to the trial itself. Some of these items were acquiesced in by the U.S. Attorney, some contested. Among those items opposed were the request for a list of prospective Government witnesses, and a request for the criminal records, if any, of these witnesses.

The situation here is a capsule illustration of the handicap under which the defense always labors. At the time the defense issues subpoenas in a criminal matter, for witnesses, etc., the returns are filed in the criminal jacket, in the public file, and are, therefore, available to anyone who cares to examine them. On the other hand, returns on Government subpoenas are kept in the custody of the U.S. Marshall, unavailable to defense counsel, until such time as the case is actually assigned to a Court for trial.

Thus, the Government may, at its leisure, obtain a list of defense witnesses, and their criminal records, if any, from both the Metropolitan Police Department and the F.B.I. On the other hand, the defense (1) normally cannot discover in advance (except for those named in the indictment) who will testify for the Government, and even if it does (2) has no access to the F.B.I. criminal record. In an area with such a transient population as this one, this is a double handicap, and seems in direct conflict with the provisions of the 6th Amendment.

It is, after all, somewhat of a nullity to guarantee a defendant "compulsory process for obtaining witnesses in his favor", and then say "but you cannot have material available to me, and which may be used against you but

not for you." And that, in effect is what happens in these instances. The F.B.I. is a Government agency, supported by the taxpayers. Its criminal records are always available to the prosecution, to be used against the defense in any manner legally admissable. But the reverse is not true. If as often happens (for instance when an out-of-town informer is imported by Treasury Agents), a witness for the prosecution testifies who has no local record, the defense has no means of determining whether that witness has a record in any other jurisdiction, even Maryland or Virginia. The witness may, in fact, be a murderer, drug peddler, no matter; the defense cannot find it out. Needless to say, however, the defendant's record, no matter how remote in time or location is always in the prosecution hands.

The whole matter is neatly demonstrated in the incident involving Zaviola Sokol. Counsel had been attempting for months to track down Mrs. Sokol's record, to be balked at every turn (mostly by the witness's light regard for honesty), and also by the ban against making these records available. At the trial, the prosecutor, on direct examination, made mention of a conviction of the witness, only to be promptly reprimanded by the Court before the jury (tr. 294-295). Had it not been for this incident, the defense would never have learned even of this one conviction. But the prosecutor learned from experience, and such a gift was not proffered the defense again!

This kind of hide-and-seek, with all advantages to the prosecution, is, appellant contends, hardly even-handed justice.

III

The failure to grant defendant's motion for judgment of acquittal: The appellant contends that the Court erred in denying his motion for a judgment of acquittal on several of the various counts. For the sake of clarity, it seems advisable to take most of the counts, and the evidence pertaining thereto, separately.

Preliminarily, however, counsel would like to discuss, briefly, what apparently constitutes the crime of false pretenses in this jurisdiction (and what, apparently the trial Court realized constitutes this crime.) A careful examination of both the statute and the decisions (Section 1301, Title 22, D.C. Code)makes it clear that the crime of false pretenses is the commission of an affirmative act, such as the making of a statement, with intent to defraud, and with knowledge of its falsity. The crime has been variously described by this Court as "The elements of the offense are a false pretense or false representation by the defendant or someone acting for and instigated by him, knowledge by the defendant as to the falsity, reliance on the pretense or representation by the person defrauded, intent to defraud, and an actual defrauding." (Robinson v. U.S., 42 App. D.C. 186); as "Wrongful acts, which are knowingly or intentionally committed..." (Nelson V. U.S., 97 U.S. App. D.C., 6, 227 F 2d 21, cert. den. 76 S. Ct. 700, 351 U.S. 910); and "In order to constitute the crime of obtaining money under false pretenses, the alleged false representation must be of some past, or existing fact." (Biddle v. U.S., 84 C.C.A. 415, 156 Fed. 2d. 759). In each case, one of the essential elements is clearly the doing of an affirmative act: that is, making (or procuring to be made) a false representation. That this was recognized by the trial Court is clear from the colloquy on p. 101; THE COURT: "That is not the point; that is not the point, what she believed. It is what he represented to her." and, again (tr. 103): THE COURT: "Were any of these certificates that he was a medical doctor or psychiatrist?..." MR. RENNE: "I believe there are some, yes. Yes, there are some that would lead a person to believe---" THE COURT: "No, no. Is there any certificate hanging in the defendant Daly's office that he was a diplomate, he was a psychiatrist, or a medical doctor? You have them all, don't you?" MR. RENNE: "Yes, sir." THE COURT: "All right. Answer the question." MR. RENNE: 'Not in so many words, no, sir." THE COURT: "What are you asking this question for, then? If I am a Doctor of Philosophy or a Doctor of Science in Psychology, I will have a certificate that might lead someone who didn't read it properly to think I was someone else."

This is, also, in line with the language in Johnson v. U.S., 195 Fed. 2d 673, which says "To find one guilty as an aider and abettor, ...It implies some conduct of an affirmative nature, and mere negative acquiesence is not sufficient" (emphasis added). Surely, this is equally true, and even more emphatically where the appellant is charged alone as a principal?

And, of course, there is case law in this jurisdiction to indicate that not only must the act be affirmatively committed but that even if it was committed recklessly, and not caring whether the representations were true or false, that is still not sufficient to imply criminal intent (Avant and Hughlett v. U.S., 154 A. 2d 354).

With this in mind, an examination of the testimony as to the individual counts may be enlightening.

Count 2 (false pretenses as to Col. and Mrs. Bales): Mrs. Bales had testified that appellant had told her he was a doctor and a psychiatrist, and that she relied on that. However, on cross-examination, the following occurred: (tr. 241) Q. "But he didn't tell you, 'I am a medical doctor.' " A. "No." Q. "And actually what you are saying is he told you 'I am a psychiatrist'?" A. "That's right."; but compare this with tr. 243, same witness. Q. "He did not say 'I am a psychiatrist'." A. "No, he did not say it in so many words." Col. Bale never at any time testified that Appellant had told him he was a medical doctor or psychiatrist (tr. 266-67; and 283). He was allowed to testify (over objection) that "he believed Dr. Daly to be a psychiatrist". It would seem clear from this that the Government failed to prove essential allegations of that count of the indictment, that is: "... Vincent J. Daly, with intent to defraud,falsely represented to Colonel and Mrs. Edward Louis Bale, Jr. that he, the said Vincent J. Daly, was a medical doctor duly authorized to practice medicine in the District of Columbia and that he was a psychiatrist."

Count 4 is the "Schermerhorn" count, about which the Court itself said: (tr. 491) "I wasn't impressed with him, either", and only allowed his charges

to stay in after he had been reminded by prosecution counsel of the testimony of Schermerhorn which paralleled that of another, unconnected witness (see discussion above as to severance).

Count 5 (false pretenses as to Mr. and Mrs. Sokol): The evidence on this point has been detailed earlier. Briefly, however, it consisted of Mrs. Sokol's unequivocal testimony that on the first meeting, with her husband, the appellant had specifically represented himself as a psychiatrist and a medical doctor (tr. 302), coupled with her admission that on an earlier occasion, under oath, she had testified that at no time had appellant made such a representation in her hearing (tr. 327 et. seq.). This claim was not substantiated by her husband, whose recollection of the conversation is set forth in full detail at an earlier point in this brief. What it came to was that they "assumed" he was a psychiatrist (tr. 333-34).

All of the aforementioned witnesses admitted that, at one time or another they had examined the various certificates admitted into evidence, most of which make it clear that the appellant was practicing as a psychologist; some admitted seeing the sign on the door saying psychoanalyst or psychologist; none claimed to have seen the customary license issued by the District for medical doctors. All were paying fees having absolutely nothing in common with usual psychiatric fees; at least one admitted having been referred by a psychological association.

In denying the various motions on these points, the Court commented at one time that these crimes can be committed by indirection as well as by direct misrepresentation (tr. 492), giving this as his reason for at least one denial. This does not appear to be the law in this jurisdiction, as discussed earlier in this section.

Nor, it would appear from the record, did the Court actually believe this was the law. In addition to the conversation cited, supra, there are other illuminating passes, (e.g. tr. 101) THE COURT: "...You didn't go and retain him to treat you and your son as a result of any false representation made by

the defendant Daly that he was a medical doctor or psychiatrist?" Note, this does not ask what she believed, or what someone else told her, or what he implied, but what representations he made. This was seen again in the questioning of the witness Nelson, (tr. 156) when the Court interrupted the direct examination to inquire "Did he also tell you he was a psychiatrist?"; again (tr. 159), with the query "Would you have gone to him if he had not told you he was a Doctor of Psychiatry?", and again (tr. 196) when the Court, inquiring about one of the certificates said "This exhibit, number 16, you didn't get the impression from this title, Sir Guys Hospital, that Doctor Daly was a doctor, did you?" ... "That didn't convey to you that he was a doctor of medicine did it?" ... "He told you he was a doctor." ... "He told you he was a psychiatrist; right?" and (tr. 197) "Would you have taken your son to him if he had told you he wasn't a medical doctor or psychiatrist?" The Court intervened in the same tenor during the direct examination of the witness Sybil Bales (tr. 222-223): "On your first visit did he represent to you that he was a doctor and a psychiatrist?"; "And did you believe these representations to be true?"; "As a result did you place your son under his care?" (This may be contrasted with Mrs. Bales testimony, described heretofore, where she denied that appellant made these representations.) The Court intervened again, on the same theme, leading the witness, and interrupting cross examination at a crucial point on two further occasions (tr. 242, and 239). Nor is this the last instance: during the direct examination of Mrs. Sokol (tr. 305-6) the Court interrupted to propose the following series of questions to Mrs. Sokol: "Do I understand you to say that in February of 1963 that the defendant represented to you and your husband that he was a medical doctor and a psychiatrist?"... "Did you believe them to be true, those representations?" and so on, for two pages.

Yet at the conclusion of all this testimony, the leading questions by the Court, etc., the fact remained that each witness except Nelson and Schermerhorn (with whom the court "was not impressed") denied that appellant had ever made the misrepresentations alleged in the indictment.

The Court's denial of the motion for acquittal as to Count 6 is particularly hard to understand. Six was one of a group of four counts charging healing arts violations against (6) James Athanas (9) Charles J. Bales (11) Daniel J. Nelson and (16) Vida Zoe Sokol. All of these were children of the various witnesses; none of them testified. The Court granted motions as to 9, 11, and 16, without argument; indeed, almost without opposition (tr. 493-495); but denied it as to 6. This is doubly peculiar, because the testimony on this point reveals that after the boy had been tested, appellant advised the witness that "he was not getting through to the boy", and referred him elsewhere for treatment (tr. 84-86).

The evidence as to counts 10, 12, 15, and 17 is substantially identical (each of these counts charges violations of the healing arts against one of the witnesses: Mrs. Bale, Mrs. Nelson, Mr. Schermerhorn, and Mrs. Sokol): that is, they each testified, without any corroboration of any kind that the appellant had on one occasion or another given them a pill or pills, none of which they could produce, and the nature and contents of which they could not vouch for. (One of them candidly admitted "It could have been an aspirin, Your Honor." tr. 317). It seems inconsistent, to say the least to grant acquittal on count 16, when the testimony was that the child received ammonia and coke on one occasion, and vitamin pills on another, and then decline an acquittal when there is no evidence that the "medication" in question was anything more than aspirin or a sugar pill.

Reference to the Code is of little assistance on this point. While the relevant Title (Sec. 101, Title 2, D.C. CODE) gives a number of definitions, "medication" is not among them. However, since the allegation was made in the indictment, it was certainly the Government's burden to prove that "mediciation" was administered; and this proof is not to be found in the transcript.

Count 19 charges appellant with the possession of certain dangerous drugs on May 1, 1963 (the day of the "raid"). At the close of the Government's case, the evidence then before the Court showed that the drugs in

question were seized from the appellant's office; it also showed that those offices were shared by a licensed physician. The transcript at no point prior to the close of the Government's case in chief contains any evidence on the point of whether the possession charged was Appellant's possession or that of the licensed doctor, who was certainly entitled to have them.

Count 24 charges the appellant with possessing, sometime between February 28, 1963, and April 1, 1963 3 tablets of a prohibited drug, unlawfully; Count 25, charges him with dispensing this drug to Zaviola Sokol during that period. Count 26 charges possession of another prohibited drug on April 18, 1963, and its delivery on that date to Mrs. Sokol. These counts taken in conjunction with Mrs. Sokol's testimony are interesting, because Mrs. Sokol says, regarding all the relevant exhibits: (tr. 323) "He gave me all of them the same day, and I was going to try them all out to see which one curbed my appetite." This would certainly seem to bear out the contention made by counsel that these should, in fact, have merged. Further the same observation made about Count 19 applies to the possession counts here (24 and 26).

One final observation as to the facts might be pertinent before a discussion on the general legal principle involved in this section is begun. The evidence in this case might be said, roughly, to be divided into two categories: documentary and oral. The documentary classification included such things as the certificates seized from the walls, and the office (Sc.D. of Urbiculture, Association of Social Psychiatry, certificate of service as staff head at Huntington Hospital, Association of Military Surgeons, Sir Guys, certificate, etc.) Of all this material, only the Sir Guys certificate was even attacked (see Section VI). All the other documentary evidence introduced indicated that appellant was what he said: a psychologist. And this material was not only available to the complaining witnesses in appellant's waiting room, but most of them admitted having read it. (It is interesting to note that there may be said to be one exception to this: On the Sunday following appellant's arrest, the Sunday Star published a full-page

article, setting forth a great deal of prejudicial information (or misinformation) about the appellant, the bulk of which the prosecution did not even attempt to prove; but it appears from the record that all the prosecution witnesses had read this data before testifying, even at the preliminary hearing.)

The background which the prosecution went to some pains to try to disprove, was set forth in the first place by oral testimony only. (One sets up windmills so that one may knock them down again.) This would include appellant's alleged participation in the Battle of the Bulge (a Marine Colonel professed to believe that appellant had been Gen. Patton's chief surgeon, at the age of 24); appellant's alleged training at Oxford (which college?), and the famous "Bern" certificate, heard of for the first time in the Star article just mentioned. NOTE: It would appear, however, that the Star did not describe this creation quite fully enough; or maybe the witnesses just didn't read the article with enough care. It was variously described as from the University of Bern, a hospital at Bern and the "Faculiti Berni"; and one witness described it as mentioning Austria. As to language, it was written in German, or English, or Latin, or a combination, depending on your witness; which appellant feels was most accommodating of the Swiss (or was it Austrians?).

Admittedly, each of these challenged counts must be examined individually, in the light of the particular evidence which pertained to it (at least so far as this can be done, considering the chaotic condition of the testimony.) However, there are, of course, one or two basic principles which must always govern the Court in its decision on whether to submit a charge to the jury for its consideration. The first of these considerations is whether there is evidence of some fact which to a reasonable mind fairly excludes the hypothesis of innocence, and this refers not to the absence of evidence, but to the requisite presence of evidence (Curley v. U.S., 81 U.S. App. D.C. 389, 160 F. 2d 229). As the Supreme Court said (U.S. v. Ross, 92 U.S. 281, 123 L.Ed. 707), "The law requires an open, visible connection between the principle and evidential facts and deductions from them, and does not permit a decision to be

made on remote inferences." The evidence on the challenged counts seems to range from non existent (count 6) to ambiguous (counts 19, 24, and 26, for example.)

Of the reported cases in this jurisdiction on this point, Freidus v. U.S., 96 U.S. App. D.C. 133, 223 Fed. 2d 598, seems to bear the most resemblance to the instant case. In Freidus, appellant was convicted of various charges of having misrepresented his financial status to the R.F.C.; the Court reversed,with directions to enter a judgment of acquittal, after a careful discussion of the evidence, and its interpretation. A reading of the opinion makes it appear that the evidence against Freidus was of at least as high calibre as that against Daly in this case; if this is so, then a similar order would, of course, be justified in this case.

It would seem proper to propound another query in this section; granted the premise that the jurors are the judges of credibility, as the triers of the facts, must the Court always submit to them any charge on which there is some evidence, no matter how incredible? This refers, specifically to the Sokol incident, where the witness was clearly shown to have reversed her testimony on the most crucial point (tr. 327-337). Is there no point at which the Court can say, "There is no credible evidence on this point?"

Briefly, appellant contends that many of the counts submitted to the jury were not supported by sufficient evidence to justify this submission; that in most of the challenged counts, the evidence did not fairly exclude the hypothesis of innocence. And he therefore asks this Court to reverse on all counts where it seems appropriate, with directions to enter a judgment of acquittal, and to reverse on the other counts, because of the prejudice attendant upon the large number of counts submitted to the jury.

IV

The Judge's participation in the case: Most of the substance for this question is to be found described in detail in other sections of this brief.

However, it would be well to summarize, and perhaps add one or two points which may not be clearly brought out elsewhere.

There was, first, the matter of the Court's frequent interruption of both direct and cross examination. In most cases of a prosecution witness, the questions were not only leading, but were designed to bring out testimony which would comply with the statutory requirements for conviction (supra section III). There was, additionally, the matter of the limits imposed on counsel for the defense, both in offering defense testimony, and in examining prosecution witnesses (for one example, see tr. 778-779, which clearly spells this out). Further, there was the incident where the Court warned the prosecution, in open court, that he need not bring out criminal records of his witnesses (tr. 294-295). The Court's debate with counsel in open court at the time of the passport witness (tr. 440-445) which put counsel, quite improperly, on the defensive, could have done the appellant's cause no good with the jury; nor was this exchange of the defendant's choosing. There were other, less prolonged incidents, but the whole matter flared up again during the testimony of Dr. Savarese (tr. 546-47; 548-51; 554-562). Here, the Court's examination of the Dr. was hostile, and went beyond the bounds attempted by the prosecutor himself; as did the exchange with counsel which marked its termination.

In addition to these, and other, lesser, incidents, appellant contends that the trial Judge usurped the function of the jury on one important point. At the time of the charge, he was requested to read the sections of the Code which include the exceptions to the possession of dangerous drugs (D.C. Code Title 33, Sections 703 and 704). Under the evidence, the determination of whether appellant's possession came within these exemptions was clearly a question of fact for the jury. However, despite a specific request on this point, the Court declined to read the relevant sections to the jury (tr. 926-27), and gave a charge which caused counsel to object that he had, in effect, instructed the jury to convict on the counts in question (tr. 973).

This last conduct seems to be on all-fours with the actions of the trial judge which caused a reversal in Hardy v. U.S., (No. 18,513), decided June 25, 1964 by this Court. There this Court points out two matters which they felt were errors: the exclusion of certain evidence, with the summarizing statement which concludes "That is the only question for the jury to decide!" And the removal of certain factual issues from the jury, which is, as appellant contends, exactly what happened here.

Another recent decision appears equally in point, that of Jackson v. U.S., ____U.S. App. D.C.-------, _____F.2d. ____ (No. 18,144, decided February 20, 1964.) This Per Curiam opinion contains considerable language which seems particularly pertinent to the actions of the trial Judge in this case. "At best, it is difficult on appellate review to appraise the impact of intervention by the presiding judge and determine whether his participation exceed permissible bounds. However this transcript reveals what seem to us an inordinate number of instances of extensive examination and cross-examination of witnesses and comments by the court. Fairly read, no single comment or question, or line of questioning, can be regarded as prejudicial, but the cumulative impact of all the trial judge's activist participation could well have been prejudicial at the very least and could have led jurors to give undue weight to points treated by the judge. In this case the responses elicited by the judge were largely adverse to appellant. In itself this does not render the judicial intervention impermissible but in it were the seeds of tilting the balance against the accused and casting the judge, in the eyes of some jurors, on the side of the prosecution." The opinion goes on to discuss the preferred method, should the judge feel that the truth is not being adequately developed, and makes it clear that the interrogation of witnesses should be left to counsel, under most conditions. Because of the record as a whole, that case was remanded for a new trial.

This case appears to be four-square with Jackson. Reference to the transcript finds the trial Judge intervening almost constantly, and almost always on behalf of the prosecution. (For some examples on this point, see

tr. 156, 159, 196, 197, 222-23, 239, 242, in addition to those cited earlier in this section.) And, of course, the Court always has one major advantage over counsel: he can interrupt the testimony of any witness, at any point, to pose leading questions, and this the Judge did not hestitate to do. And the above-cited cases are, of course, only two among many forbidding this type of intervention. The opinion in Marzano v. U.S., 149 F. 2d. 923, says specifically that the Judge must not be the prosecutor, or a partisan; that prosecution and judgment are two functions which must not merge, as does the opinion in Meltzer v. U.S., 100 F. 2d. 739 (at 747-8, cases cited.)

As this Court said in Billeci v. U.S., 87 U.S. App. D.C. 274, (at p. 283), 184 F. 2d. 394 (at p. 402) "But the responsibility for producing evidence which will persuade twelve jurors of guilt beyond a reasonable doubt is upon the prosecutors. It is a serious public responsibility, but it is upon the prosecutor and upon him alone. The judge has no part in that task... The judge is a disinterested and objective participant in the proceeding. Prosecution and judgment are two quite separate functions in the administration of justice. They must not merge."

The language of the Starr case (Starr v. U.S., 153 U.S. 614 at 626) appears particularly pertinent here, where it says that the influence of the judge is necessarily and properly of great weight with the jury: his lightest words are received with deference, and may be controlling. And who can say, when the jury retired, whether they remembered the prosecution witnesses final admissions that appellant had not made the alleged misrepresentations, or whether they recalled the Judge's firm voice saying "He told you he was a doctor?"

For other cases on the point, see Gudger v. U.S., 312 F. 2d. 268 and the language in Quercia v. U.S., 289 U.S. 466 (at 471). Also, the Court's attack on Dr. Savarese might be read in light of the opinion in Blunt v. U.S., 100 App. D.C. 266, 244 F. 2d. 355.

In brief, appellant contends that the Court's intervention was so extensive that it deprived him of a fair trial, and requests a reversal.

V

Failure to grant a mis-trial: As has been indicated, all the material seized and introduced (with the possible exception of the Sir Guys certificate) was apparently legitimate, since the Government challenged only the Sir Guys one (and that with very questionable evidence). In fact, it was established that the societies mentioned were respectable, functioning organizations, and that appellant was a duly admitted member. Further, all the written material introduced into evidence - advertisements, pamphlets, magazines - and available to the complainants, made it clear the appellant was practicing as a psychologist. It was in light of this that the following incident was so prejudicial.

During the cross examination of one of the last defense witnesses, the prosecutor produced what, from the record, appears to have been a magazine or pamphlet. He made no effort to show that appellant was even familiar with its contents, much less that he had authorized or instigated them. He did not, as fairness might have indicated, show it to defense counsel, and allow him a chance to make his objections at the bench before the damage was done.

Instead, he put the question to the witness on the stand, and elicited the following answer: "Yes. I remember at the time I complained about it to Dr. Miller who edited this issue. I didn't have anything to do with the editing of this issue. You refer, of course, to the M.D. after his name. That was either a typographical error or stupidity." (tr. 800) The prompt request for a mistrial was denied. It is, of course, impossible to judge the effect of this incident on the jury, but coming as it did, it could not have failed to be highly prejudicial. The material was, of course, inadmissable per se, unless the prosecution was prepared to prove the appellant's complicity in its publication. From the manner in which they chose to smuggle it in, it seems a fair inference that they could not prove any such thing. Appellant contends that the manner in which the prosecutor handled the incident was

reprehensible, the material was both inadmissible and prejudicial and that the motion for a mistrial should have been granted.

VI

The introduction of records under the Shop Book Rule: Towards the close of the Government's case in chief, the Court admitted into evidence, over defendant's objections, several documents, apparently under the Shop Book Rule. This, of course provides (Rules of Civil Procedure, Rule 44(b)) that if, after diligent search no given record is found, the officer who has custody of that official record may make a certificate to that effect, and this admissible in evidence. However, appellant contends that the challenged records did not, in fact, qualify under this rule.

Although there was no written material whatsoever to corroborate this, one or more witnesses testified that appellant had said he studied at Oxford University. The first of the contested documents (tr. 411 and 428) was a certificate from the Dean of Christ College, Oxford, stating that the records did not reveal that Vincent Joseph Daly was in attendance at Christ Church College, Oxford University during the period 1935 to 1963. The affiant was not himself present in Court. While this may have been admissible, as far as it went, appellant contends it was incorrectly admitted for a number of reasons: there was no opportunity to question the affiant as to the extent of the search or the completeness of the records in question. But even more important is the fact that there was no opportunity to bring out that (1) Christ Church is only one of more than a dozen colleges which make up the University entity (Encyclopedia Britainnica, 1959 ed. vol. 16, p. 994); and (2) students attending these colleges come in at least two, and possibly more than two categories (ibid, p. 995). It is impossible to judge from the certificate whether this covers all possible categories or not, even in the one college.

The second challenged document was a certificate from the Superintendent of Guy's Hospital, and says, in pertinent part (tr. 429) "...this search re-

vealed that no Vincent Joseph Daly held an appointment as intern, or in any other qualified professional capacity during the period 1935-1963, according to these records, which are, however, incomplete for the period 1935-1939!" Again this appears objectionable for no opportunity was afforded counsel to determine the extent of the available documents, or their accuracy. However, the worst is yet to come, for the document goes on to say "During these years, however, I held a senior appointment myself and knew all the house officers well and I have no recollection of any such man." This portion of the document can by no stretch of the imagination come under the Shop Book Rule; it is pure and simple hearsay, and was clearly objected to on that ground (tr. 411 and 427).

While the Rule does not say so in so many words, it is certainly a fair inference that when it speaks of the custodian of the records, and a search of them, it means all the records. But in each of the above instances it is clear that all of the records were not in fact examined, and appellant contends that for that reason if no other the documents were inadmissible. The same objection applies to the next document, from the President of the Canton of Bern, Switzerland, which says, in pertinent part: "According to the records of the University of Bern, Vincent Joseph Daly has not been granted a doctor's degree." Apart from the fact that it does not appear that this affiant was the custodian of the relevant records, the certificate is again incomplete, as it does not state whether the appellant ever, in fact, studied at the University, or whether he was awarded a degree other than a doctor's degree.

Indeed, appellant questions whether even a complete certificate is admissible without some testimony from the maker. The matter of proving such a negative was raised in Bussie v. U.S., 81 A2 247. The Court upheld the proof, which consisted of the personal testimony of the police officer who made the questioned search, pointing out that the officer was there, and subject to cross-examination. Again, in Shore v. U.S., 61 App. D.C. 18, 56 Fed. 2d 490 (cert. den. 285 U.S. 552) this Court approved testimony as to non-existence given by the custodian who made the search.

Also admitted over objection was a certificate from a D. Brunner, Secretary to the Dean of the University of Bern, Switzerland. That affidavit says, in pertinent part (tr. 431) "Our official address is called the "University of Bern, Medical Faculty' and the title 'Faculty Berni Austria' is not known to us. We have been unable to find the name Vincent Daly anywhere in our records."

Appellant contends that at least three of these documents were inadmissible for yet another reason - they were not relevant. The seized certificate was from Sir Guys Hospital (no geographical location given). There is no evidence to connect this with the Gusy Hospital in London, England, whose chief submitted a certificate. Nor, it may be noted (as did the Court, tr. 196) does the certificate in question represent that appellant was an intern or a "house officer" as negatived by the certificate.

The Swiss certificates are also objectionable on the ground of relevancy. As noted before, this "Bern" certificate was one of the puzzles of the trial. The document was not among those seized, although the prosecution conceded "We got everything" (tr. 103). It was described by various witnesses as being from the "University of Bern", "Bern Hospital" and the "Faculiti Berni"; as well as being from Austria. Nor did the witnesses agree on its language; that is, whether it was in English, Latin, German, or a combination. In the light of this utter confusion, and of the absence of the best evidence (if it ever existed at all, which seems unlikely), that is the certificate itself, the Swiss certificates do not appear appropriate, since there is no way of determining whether they are the organizations referred to. This is especially so in the light of the "Austria" mentioned.

Even assuming the Court finds these certificates, incomplete as they were, admissible, this still leaves the question of the hearsay included in the Guy's document. Certainly the testimony of the affiant would have been admissible in open Court if "Guys" and "Sir Guys" were proved to be the same: but to admit such a statement, with no opportunity for the affiant even to see the appellant whom he doesn't remember, much less for him to

be cross-examined as to recollection, set up of the hospital, etc., was, appellant contends fatal error. Taken in conjunction with the other errors, or even standing alone, appellant contends it requires a reversal of the conviction.

VII

Refusal to admit "habit" or "pattern" evidence: In this case, the prosecution, appellant contends, had the best of both worlds. It had the cumulative support of a large number of counts to bolster its case, while at the same time the defense was forbidden to introduce any "pattern" evidence whatsoever.

As the record indicates, the prosecution was able to produce Mr. and Mrs. Athanas, Mrs. Nelson, Col. and Mrs. Bales, and Mr. Shermerhorn, out of the several hundred people who had been in touch with the appellant, to testify that appellant had, in some fashion, misrepresented himself to them. In an attempt to counter this, appellant proffered to the Court many, many witnesses, to testify that, during the same period, and under similar circumstances, the appellant had very carefully made clear exactly what he was doing and what his qualifications were. Appellant also offered proof that he had specifically disclaimed such a background as that alleged by the prosecution during radio broadcasts, and in the several publications, some of which were allowed into evidence, as well as in the various advertisements, telephone listings, etc.

It is, of course, settled law, that under many circumstances, proof of a similar offense is admissable, as having probative value during a trial (e.g. Fairbanks v. U.S., 96 U.S. App. D.C. 345, 226 F.2d 251; Harper v. U.S., 99 U.S. App. D.C. 324, 239 F.2d 945; Bracey v. U.S. 79 U.S. App. D.C. 23, 142 F. 2d 88; Borum v. U.S., 61 App. D.C. 4, 56 F. 2d 301; Copeland v. U.S., 80 U.S. App. D.C. 308, 152 F. 2d 769 (cert. den. 341 U.S. 841); Green v. U.S., 88 U.S. App. D.C. 249, 188 F. 2 48 (cert. den. 341 U.S. 955); Brehm v. U.S.,

90 U.S. App. D.C. 370, 196 F. 2d 769 (cert. den. 344 U.S. 838); Adams v. U.S., 99 U.S. App. D.C. 288, 239 F. 2 451). If this is so, why should not the reverse se also be true? If Appellant were, indeed, snaring patients by defrauding them as to his qualifications, certainly under the aforementioned cases, the Court might have admitted evidence to that effect. On the other hand, if he were not doing so, why would not evidence to that effect be admissible? There is certainly no indication that the complaining witnesses here were among appellant's more profitable patients -- quite the reverse in fact. Nor is there evidence here that the complainants were so reluctant to submit to his care that they had to be persuaded by a series of misrepresentations; or that he was so lacking in business that he had to resort to such tactics to get along.

If the complainants were, indeed telling the truth, there must have been many other people to whom the appellant had misrepresented; the prosecution produced not another one. If they were not telling the truth, appellant was entitled to demonstrate it. And one of the most effective methods of doing this was denied him. That is, the testimony of many patients, who knew him well, and who stood ready to testify that this was not his "modus operandi"; he did not lure patients in and defraud them by such misrepresentations. Nor were doctors who had referred work to him permitted to testify. And surely, if anyone would be concerned about such misrepresentations, it would be members of the medical profession, for not only would their own reputations be imperiled, were appellant misrepresenting himself as an M.D., but so would the integrity of the profession itself.

VIII

Failure to permit appellant to rebut probation report: The last of the errors complained of was the refusal of the Court to make either the probation report, or a summary of its contents available to counsel, so that appellant could supply additional evidence to the Court for consideration

in imposing sentence (see Supp. Tr. pp. 2-3). Although appellant was eligible for probation, he received the maximum term permissible for one felony count, although all counts run concurrently.

The right of allocution at sentence is a long established one (see discussion in Couch v. U.S., 98 U.S. App. D.C. 292, 235 F. 2d 519). And it is one which has often been reaffirmed by this Court (see Gadsden v. U.S., 96 U.S. App. D.C. 162, 223 F. 2d 627; and Coleman v. U.S., _____ U.S. App. D.C. ----, _____F. 2d ____(May 1, 1964). This is, of course, on the theory that the defendant has a right to present any facts or information he has which may move the Court in mitigation of his punishment, or as was said in Martin v. U.S. 182 F. 2d. 225, 20 A.L.R. 2d 236, "...there is the opportunity afforded for presentation to the Court of facts in extenuation of the offense, or in explanation of defendant's conduct; to correct any errors or mistakes in reports of the defendant's past record..." But how is this opportunity to be effectively afforded a defendant who does not know what facts the Court is considering in imposing sentence? How can a defendant rebut an accusation that he does not know has been made?

There is a Supreme Court opinion which contains some very compelling language on this point (Joint Anti-Facist Refuge Committee v. McGrath, 341, U.S. 123), in discussing the right to be heard before being deprived of liberty, property, etc., the opinion says: "The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must, therefore, practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." (at p. 170) and "Secrecy is not congenial to truth telling, and self-rightousness gives to slander an assurance of rightness. No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."

For all appellant knows, the sentence imposed might have resulted from the Court's having been informed (entirely erroneously) that he has a criminal record in a dozen other states; or have resulted from any one of a thousand pieces of misinformation, about which it is useless to speculate. The right of allocution, whether in person or through counsel, is a practical useful right only to the extent that it is an informed right.

Because trial preparation had uncovered a number of inaccuracies, omissions, and discrepencies in various records, appellant was particularly concerned about what would be contained in the probation report. Therefore a document, setting in forth in some detail such errors as had been discovered and could be documented was filed with the Court prior to sentence, and at the Court's direction was made a part of the official record. Even a casual perusal of this reveals considerable basis for defendant's apprehension about what manner of misinformation is contained in the probation report. Since that report was, as stated above, never made available, and is, therefore, not a part of the record before this Court, it is impossible to determine what it does contain by way of inaccuracies. It is equally impossible to ascertain whether the document offered by appellant even begins to satisfy and answer the material set forth in that probation report. In short, appellant's effort to protect himself, and satisfy the Court by drawing attention to the errors he was aware existed, may have been (and judging from the sentence probably were) entirely futile. Appellant says this is not an effective right of allocution.

CONCLUSION

Appellant, therefore, asks this Court to reverse the judgment in its entirety; to remand, with directions to enter a judgment of acquittal as to

those counts discussed under Section III, and with directions for a severance, and for new trials on the remaining counts.

John J. Dwyer and
Jean F. Dwyer, for
DWYER & DWYER
602 Fifth Street, N.W.
Washington 1, D. C.
Attorney for Appellants

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Holding a Criminal Term
Grand Jury Sworn in on May 7, 1963

UNITED STATES OF AMERICA
v.
VINCENT J. DALY

Criminal No.
Grand Jury No. 525-63
Violations: 22 D.C. Code 1301
2 D.C. Code 102
33 D.C. Code 702 (a)(1)
33 D.C. Code 702 (a)(4)

The Grand Jury charges:

Commencing on or about January 1, 1961 and continuing until on or about February 1, 1961, and commencing again on or about August 15, 1961 and continuing until on or about November 11, 1961, within the District of Columbia, the defendant, Vincent J. Daly, with intent to defraud, falsely repsented to Mrs. Wanda Athanas that he, the said Vincent J. Daly, was a medical doctor duly authorized to practice medicine in the District of Columbia and that he was a psychiatrist.

These representations and pretenses were false and the defendant, Vincent J. Daly, knew them to be false, but Mrs. Wanda Athanas, believing them to be true and relying upon them, did, within the District of Columbia, place herself and her son, James, under the care of said defendant for psychiatric examination, diagnosis and treatment, and paid to Vincent J. Daly the sum of $150.00.

COUNT TWO

Commencing on or about September 20, 1962 and continuing until on or about April 30, 1963, within the District of Columbia, the defendant, Vincent J. Daly, with intent to defraud, falsely represented to Colonel and Mrs. Edward Louis Bale, Jr. that he, the said Vincent J. Daly, was a medical

doctor duly authorized to practice medicine in the District of Columbia and that he was a psychiatrist. The defendant further represented that he had received at least a portion of his medical training at Oxford University, Oxford, England; that he had been professionally associated with a Sir Guys Hospital; that he had been a Colonel in the Army Medical Corps during World War II and served as General Patton's personal physician during the Battle of the Bulge.

These representations and pretenses were false and the defendant, Vincent J. Daly, knew them to be false, but Colonel and Mrs. Edward Louis Bale, Jr., believing them to be true and relying on them, did, within the District of Columbia, place their son, Charles, under the care of said defendant for psychiatric examination, diagnosis and treatment, and paid to Vincent J. Daly the sum of $375.00.

COUNT THREE

Commencing on or about November 9, 1962 and continuing until on or about April 30, 1963, within the District of Columbia, the defendant, Vincent J. Daly, with intent to defraud, falsely represented to Mrs. Esther Henrietta Nelson that he, the said Vincent J. Daly, was a medical doctor duly authorized to practice medicine in the District of Columbia and that he was a psychiatrist. The defendant further represented that he had been professionally associated with a Sir Guys Hospital and that he had been stationed with a medical unit in Germany during World War II.

These representations and pretenses were false and the defendant, Vincent J. Daly, knew them to be false, but Mrs. Esther Henrietta Nelson, believing them to be true and relying upon them, did, within the District of Columbia, place her son, Daniel, under the care of said defendant for psychiatric examination, diagnosis and treatment, and paid to Vincent J. Daly the sum of $270.00

COUNT FOUR

Commencing on or about January 1, 1963 and continuing until on or about April 30, 1963, within the District of Columbia, the defendant, Vincent J. Daly, with intent to defraud, falsely represented to Vincent A. Schermer-

horn that he, the said Vincent J. Daly, was a medical doctor duly authorized to practice medicine in the District of Columbia and that he was a psychiatrist. The defendant further represented that he had been General Patton's Senior Medical Officer during the Battle of the Bulge.

These representations and pretenses were false and the defendant, Vincent J. Daly, knew them to be false, but Vincent A. Schermerhorn, believing them to be true and relying upon them, did, within the District of Columbia, place himself under the care of said defendant for psychiatric examination, diagnosis and treatment, and paid to Vincent J. Daly the sum of $850.00.

COUNT FIVE

Commencing on or about February 16, 1963 and continuing until on or about April 18, 1963, within the District of Columbia, the defendant, Vincent J. Daly, with intent to defraud, falsely represented to Mr. and Mrs. Stephan J. Sokol that he, the said Vincent J. Daly, was a medical doctor duly authorized to practice medicine in the District of Columbia and that he was a psychiatrist. The defendant further represented that he had been professionally associated with a Sir Guys Hospital.

These representations and pretenses were false and the defendant, Vincent J. Daly, knew them to be false, but Mr. and Mrs. Stephan J. Sokol, believing them to be true and relying upon them, did, within the District of Columbia, place their daughter, Vida, under the care of said defendant for psychiatric examination, diagnosis and treatment, and paid to Vincent J. Daly the sum of $125.00

COUNT SIX

Commencing on or about January 1, 1961 and continuing until on or about February 1, 1961, within the District of Columbia, the defendant, Vincent J. Daly, did unlawfully practice the healing arts; to wit, examining, diagnosing, treating and prescribing for one James Athanas, without having first obtained a license so to do from the Commission on Licensure for the District of Columbia.

COUNT SEVEN

Commencing on or about August 15, 1961 and continuing until on or about November 11, 1961, within the District of Columbia, the defendant, Vincent J. Daly, did unlawfully practice the healing arts; to wit, examining, diagnosing, treating and prescribing for one Wanda Athanas, without having first obtained a license so to do from the Commission on Licensure for the District of Columbia.

COUNT EIGHT

Commencing on or about June 1, 1962 and continuing until on or about March 31, 1963, within the District of Columbia, the defendant. Vincent J. Daly, did unlawfully practice the healing arts; to wit, examining, diagnosing, treating and prescribing for one Katherine Sinclair Sisto, without having first obtained a license so to do from the Commission on Licensure for the District of Columbia.

COUNT NINE

Commencing on or about September 20, 1962 and continuing until on or about April 30, 1963, within the District of Columbia, the defendant, Vincent J. Daly, did unlawfully practice the healing arts; to wit, examining, diagnosing, treating and prescribing for one Charles J. Bale, without having first obtained a license so to do from the Commission on Licensure for the District of Columbia.

COUNT TEN

During the period from on or about September 20, 1962 to on or about December 31, 1962, the specific date being unknown to the Grand Jury, within the District of Columbia, the defendant, Vincent J. Daly, did unlawfully practice the healing arts; to wit, the dispensing of medication for one Sybil G. Bale, without having first obtained a license so to do from the Commission on Licensure for the District of Columbia.

COUNT ELEVEN

Commencing on or about November 9, 1962 and continuing until on or about April 30, 1963, within the District of Columbia, the defendant, Vincent

J. Daly, did unlawfully practice the healing arts; to wit, examining, diagnosing, treating and prescribing for one Daniel J. Nelson, without having first obtained a license so to do from the Commission on Licensure for the District of Columbia.

COUNT TWELVE

During the period from on or about November 9, 1962 to on or about April 30, 1963, the specific date being unknown to the Grand Jury, within the District of Columbia, the defendant, Vincent J. Daly, did unlawfully practice the healing arts; to wit, the dispensing of medication for one Esther Henrietta Nelson, without having first obtained a license so to do from the Commission on Licensure for the District of Columbia.

COUNT THIRTEEN

During the period from on or about October 1, 1962 to on or about October 31, 1962, the specific date being unknown to the Grand Jury, within the District of Columbia, the defendant, Vincent J. Daly, did unlawfully practice the healing arts; to wit, the dispensing of medication for one Raube Walters, without having first obtained a license so to do from the Commission on Licensure for the District of Columbia.

COUNT FOURTEEN

During the period from on or about January 1, 1962 to on or about January 31, 1962, the specific date being unknown to the Grand Jury, within the District of Columbia, the defendant, Vincent J. Daly, did unlawfully practice the healing arts; to wit, the dispensing of medication for one May B. Carr, without having first obtained a license so to do from the Commission on Licensure for the District of Columbia.

COUNT FIFTEEN

Commencing on or about January 1, 1963 and continuing until on or about April 30, 1963, within the District of Columbia, the defendant, Vincent J. Daly, did unlawfully practice the healing arts; to wit, examining, diagnosing, treating and prescribing for one Vincent A. Schermerhorn, without having first obtained a license so to do from the Commission on Licensure for the District of Columbia.

COUNT SIXTEEN

Commencing on or about February 16, 1963 and continuing until on or about April 18, 1963, within the District of Columbia, the defendant, Vincent J. Daly, did unlawfully practice the healing arts; to wit, examining, diagnosing, treating and prescribing for one Vida Zoe Sokol, without having first obtained a license so to do from the Commission on Licensure for the District of Columbia.

COUNT SEVENTEEN

During the period from on or about February 16, 1963 to on or about April 18, 1963, the specific date being unknown to the Grand Jury, within the District of Columbia, the defendant, Vincent J. Daly, did unlawfully practice the healing arts; to wit, the dispensing of medication for one Zaviola Sokol, without having first obtained a license so to do from the Commission on Licensure for the District of Columbia.

COUNT EIGHTEEN

Commencing on or about April 1, 1963 and continuing until on or about April 18, 1963, within the District of Columbia, the defendant, Vincent J. Daly, did unlawfully practice the healing arts; to wit, examining, diagnosing treating and prescribing for one Susan Frost Mills, without having first obtained a license so to do from the Commission on Licensure for the District of Columbia.

COUNT NINETEEN

On or about May 1, 1963, within the District of Columbia, the defendant, Vincent J. Daly, did unlawfully have in his possession certain dangerous drugs; to wit, 25 tablets of Hasamal; 12 tablets of Bonaphen; 12 tablets of Ambar; 3 tablets and 21 capsules of Bentyl; 12 tablets of Probital; 6 tablets of Chardonna; 4 tablets of Tedral; 6 tablets of d-Auferiod; 6 tablets of Halabor; 4 tablets of Deltasmyl; 12 tablets of Metamine; 6 capsules of Crovas, and 4 capsules of Nilox, without an authorized prescription.

COUNT TWENTY

During the period from on or about February 1, 1963 to on or about February 28, 1963, the specific date being unknown to the Grand Jury, with-

in the District of Columbia, the defendant, Vincent J. Daly, unlawfully did have in his possession a certain dangerous drug; to wit, Plexonal, without an authorized prescription.

COUNT TWENTY-ONE

During the period from on or about February 1, 1963 to on or about February 28, 1963, the specific date being unknown to the Grand Jury, within the District of Columbia, the defendant, Vincent J. Daly, unlawfully delivered a certain dangerous drug; to wit, Plexonal, to Katherine Sinclair Sisto.

COUNT TWENTY-TWO

During the period from on or about October 1, 1962 to on or about October 31, 1962, the specific date being unknown to the Grand Jury, within the District of Columbia, the defendant, Vincent J. Daly, unlawfully did have in his possession a certain dangerous drug; to wit, Phenobarbital, without an authorized prescription.

COUNT TWENTY-THREE

During the period from on or about October 1, 1962 to on or about October 31, 1963, the specific date being unknown to the Grand Jury, within the District of Columbia, the defendant, Vincent J. Daly, unlawfully delivered a certain dangerous drug; to wit, Phenobarbital, to Raube Walters.

COUNT TWENTY-FOUR

During the period from on or about February 28, 1963 to on or about April 1, 1963, the specific date being unknown to the Grand Jury, within the District of Columbia, the defendant, Vincent J. Daly, unlawfully did have in his possession a certain dangerous drug; to wit, 3 tablets of Carboxyphen Butabarbital, without an authorized prescription.

COUNT TWENTY-FIVE

During the period from on or about February 28, 1963 to on or about April 1, 1963, the specific date being unknown to the Grand Jury, within the District of Columbia, the defendant, Vincent J. Daly, unlawfully delivered a certain dangerous drug; to wit, Carboxyphen Butabarbital, to Mrs. Zaviola Sokol.

COUNT TWENTY-SIX

On or about April 18, 1963, within the District of Columbia, the defendant, Vincent J. Daly, unlawfully did have in his possession a certain dangerous drug; to wit, Methedrine, without an authorized prescription.

COUNT TWENTY-SEVEN

On or about April 18, 1963, within the District of Columbia, the defendant, Vincent J. Daly, unlawfully delivered a certain dangerous drug; to wit, Methedrine, to Mrs. Zaviola Sokol.

Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

Foreman.

MOTION FOR A SEVERANCE AS TO COUNTS OR TO COMPEL THE UNITED STATES TO ELECT

Comes now the defendant herein and moves the Court for a severance of counts in the subject indictment or to require the United States to elect the counts on which it will proceed at the first trial.

For reason, therefore, defendant states that subject indictment embodies 27 counts involving seven families beginning January 1, 1961 and that if the evidence each family gives is considered in totality with other families, the jury would be mislead and be inclined to convict on numbers of offenses charged rather than on the merits of each individual case as testified to by the respective families. This problem has been considered by the Supreme Court in Anderson v. U.S. 318 U.S. 350. Defendant believes and avers that the joinder of offenses on different dates, supported by different sets of witnesses will be highly prejudicial. Defendant is not charged

with conspiracy but different and several crimes allegedly committed at different times on different people.

Rule 8(a) of the Federal Rules of Criminal Procedure authorizes joinder of two or more offenses in the same indictment "if the offenses charged . . . are of the same or similar character or are based on the same act or transaction. . . or constitute parts of a common scheme or plan". However, Rule 14 provides relief from prejudicial joinder. In the instant action, defendant alleges that there has been a patent attempt to convict him on a totality of evidence rather than specific crimes. The government did not see fit to charge him with conspiracy obviously because it had possession of all of his patient files, contacted many of them in an attempt to get them to compromise the defendant, to no avail. The only justification of the joinder would be common plan. If the present joinder is permitted to stand, defendant will be forced to parade dozens of patients before the Court to rebut the implication that he was engaged in what the current joinder implies -- a scheme to defraud -- but with which he specifically is not charged.

And for such other and further reasons as may be urged at the hearing of this motion.

JOHN J. DWYER
* * *
Counsel for defendant

POINTS AND AUTHORITIES

Rules 8 and 14 of the Federal Rules of Criminal Procedure.
Wheeler v. U.S., 82 App. D.C. 363, 165 F2d 225
Hall v. U.S., 83 App. D.C. 166, 168 F2d 161

JOHN J. DWYER

MOTION FOR A SUBPOENA DEUCES TECUM

Comes now the defendant and moves the Court for an order directing that a subpoena deuces tecum, issue out of this Court directed to the United

States Attorney in and for the District of Columbia, ordering him to produce at a time and place set by this Court, the following documents for the inspection and copying by counsel for the defendant.

1. Statements of all witnesses.

2. A list of all proposed witnesses for the prosecution in the subject action.

3. Any and all documents relating to defendant's educational, military, or training background.

4. Any communications relating to defendant's qualifications.

5. Any and all documents relating to defendant's employment background.

6. Copies of the police records of all government witnesses.

7. Record of the Federal Bureau of Investigation of Mrs. Stephan J. Sokol.

8. Report of the chemist on the alleged dangerous drugs.

9. The alleged dangerous drugs mentioned in the indictment.

10. Any communications in which the alleged misrepresentations are reflected.

11. Any receipts for money paid or records of payment.

For reason, therefore, defendant states that he is charged with false pretenses, healing arts violations and dangerous drug law and that all of his records were seized by the Metropolitan Police Department. Defendantfurther alleges that he is informed and believes that Mrs. Sokol has a conviction in the State of Georgia; but that the information regarding her background was falsified to this Court so that he is unable to locate the place of this conviction. Defendant refers to the transcript of the preliminary hearing and states that he has been in contact with the Chiefs of Police in the places stated by the witness but that she is unknown there. The local police records would obviously not reflect this conviction. Further referring to both the indictment and the transcript of the preliminary hearing, defendant requires knowledge of the documents showing the falsity of his alleged misrepresentations.

And for such other reasons as may be urged at the hearing of this motion.

JOHN J. DWYER
* * *
Counsel for Defendant

POINTS AND AUTHORITIES

Rule 17c of the Federal Rules of Criminal Procedure.

Fryer v. U.S.

Bowman Dairy v. U.S., 341 U.S. 214

Jencks v. U.S., 35 U.S. 657

Rule 16 of the Federal Rules of Criminal Procedure.

The record herein including the transcript of the preliminary hearing.

JOHN J. DWYER

BRIEF FOR APPELLEE

United States Court of Appeals
For the District of Columbia Circuit

No. 18686

VINCENT J. DALY, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
PAUL A. BENNE,
Assistant United States Attorneys.

EDWARD J. PESCE,
Attorney, Department of Justice.

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 12 1964

Nathan J. Paulson
CLERK

QUESTIONS PRESENTED

1.(a) Was there a clear abuse of trial court discretion in denying a motion to sever or require election, where the counts charged were of the same or similar character, all against the same defendant; the acts were all interrelated with the five felony charges, the latter occurring, principally, in contemporaneous periods of time and involving much common evidence; and where the trial was compartmentalized according to each offense charged?

(b) Was there reversible error in the Court's refusal to require the Government to supply all criminal records, if any, on all complaining witnesses, where the appellant knew all complaining witnesses well in advance of trial, conceded to the court that he had access to police records, and was clearly on a fishing expedition for possible impeachment material?

2.(a) Was the Government's evidence on the false pretenses, healing arts, possession and delivery of dangerous drugs counts, sufficient to justify the denial of appellant's motion for judgment of acquittal on several such counts?

(b) Where the evidence of a false representation by appellant, *i.e.*, that he was a psychiatrist and medical doctor, was clear in several cases, did the court commit reversible error in denying a mistrial when a defense witness, on cross-examination, responded to a proper impeachment question that he saw "M.D." after appellant's name in a book index, where the witness explained the entry to appellant's advantage, and the Government made no attempt to link appellant with such entry?

3. Where the trial was long, the witnesses and issues were many, and the trial record as a whole reveals no hostility or impropriety in the court's conduct of the trial, did the trial judge commit reversible error when he intervened periodically to examine witnesses (largely Government witnesses, being examined by Government counsel) so that relevant and unambiguous facts were elicited?

4. Where appellant was charged with falsely representing that he trained at Oxford University, England, and that he was associated with a Sir Guys Hospital, and evidence showed he made such representations as well as a claim to have studied at the University of Bern, Switzerland, were documents properly admitted into evidence which showed that all pertinent available records were searched and no record of appellant was found at any of these institutions?

5. Did the court err in refusing appellant's offer to prove his "habit" of not misrepresenting to other patients, when such proof would not be probative in the circumstances, would have unduly hampered the trial with numerous collateral issues, and was not in fact "habit" evidence?

6. Where appellant was given unlimited opportunity to state anything in his behalf prior to sentence and to submit a lengthy document of alleged errors in records of appellant's background, where a sentence of one to three years was given when a twelve-year maximum sentence on the four felony counts was possible, and where the trial court primarily relied on the crimes committed in determining sentence, was appellant denied his right of allocution by denial of access to the probation report?

INDEX

TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

Page

---

* Cases chiefly relied upon are marked by asterisks.

OTHER REFERENCES

---

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals
For the District of Columbia Circuit

No. 18686

VINCENT J. DALY, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a twenty-seven count indictment,[1] returned on July 29, 1963, Vincent J. Daly was charged in five felony counts with false pretenses (1-5); in thirteen misdemeanor counts with the unlawful practice of the healing arts (6-18); in five misdemeanor counts with unlawful possession of dangerous drugs (19, 20, 22, 24, 26); and in four misdemeanor counts with unlawful delivery of dangerous drugs (21, 23, 25, 27). At the outset of trial, the Government was granted leave to dismiss six counts (8, 13, 20, 21, 22 and 23) because witnesses were unavailable for health reasons to testify (Tr. 3). At the end of the Government's case the Government was granted leave to dismiss counts 14 and 18 (Tr. 485), and the court granted judgment of

[1] See appendix to appellant's brief.

acquittal on counts 1, 9, 11 and 16 (Tr. 489-495). The trial lasted from January 14 to Janury 29, 1964, before Judge Curran of the District Court, resulting in conviction on all fifteen counts submitted to the jury (Counts 2, 3, 4, 5, 6, 7, 10, 12, 15, 17, 19, 24, 25, 26, 27) (Tr. 974-976), the jury deliberating from 3:07 p.m. to 4:27 p.m. on January 28, and from 10:00 a.m. to 4:00 p.m. on January 29, 1964 (Tr. 973-974). By judgment and commitment filed May 1, 1964, appellant was given concurrent sentences of one to three years.

Mrs. Wanda Athanas testified concerning count 1 (false pretenses), count 6 (healing arts, James, son) and count 7 (healing arts, herself). Her son James was a behavioral problem and a poor student, and after consulting with his teacher, she called the D.C. Association of Medical Psychologists because it listed a referral service for children (Tr. 79). She advised a Mr. Ling that she wanted psychiatric help for her boy (Tr. 68-70, 79-80). Mr. Ling referred her to Dr. Daly as a psychiatrist (Tr. 80). While restricting her testimony only to the visits of her son with appellant (as opposed to her own visits later), Mrs. Athanas replied to a question by the court that appellant had not said he was a psychiatrist or a medical doctor although she thought he was a psychiatrist (Tr. 82). However, with respect to later visits when she was a patient of appellant, she testified that on the second visit for her treatment he told her he was a psychiatrist and a medical doctor (Tr. 83-84). A crucial question asked by the court during cross-examination was whether she would have continued going to appellant if he had not mentioned he was a psychiatrist. She replied "Probably . . ." (Tr. 129); she had previously testified that she already believed appellant was a psychiatrist (Tr. 80-84). The court dismissed count 1, presumably concluding that Mrs. Athanas' testimony indicated that her belief that appellant was a psychiatrist was not caused initially by *appellant's* representations.

Concerning count 6 (healing arts, James Athanas), Mrs. Athanas testified that appellant told her James was very

emotionally disturbed and needed a great deal of help which he was sure he could provide (Tr. 75). She stated that appellant told her he would have James tested by a young medical student whom he was helping out, for experience, and whom he used for lengthy testing (Tr. 77). She testified that James was tested for an hour, in the presence of appellant and the medical student, and was given many tests including the ink blot and word association tests (Tr. 77-78); that appellant saw James four times (Tr. 81); and that appellant after the last session told her James was hopeless and he could not get through to him (Tr. 85). Concerning count 7 (healing arts, herself), Mrs. Athanas testified that, on her second visit as a patient, appellant told her she needed calming down and gave her a hypodermic injection (Tr. 83, 91); that he gave her the ink blot and word association tests (Tr. 88); that after each visit he gave her pills in cellophane wrappers or loose in envelopes to calm her down, and changed the pills frequently depending on how she felt (Tr. 91-92); and that he told her, in a later visit, that she was terribly mentally ill and he would institutionalize her (Tr. 94), later referring her to a convent for a rest (Tr. 96). Mr. Louis Athanas testified that he heard appellant call the receptionist for "so many cc's of something, and she got a hypodermic needle and went into the office" where appellant was with his wife. At the end of that visit appellant told him the drug would start taking effect shortly (Tr. 141-142). He testified that his wife had pills on many occasions after her visits with appellant, one of which she would take when she got upset (Tr. 139-140). The jury convicted on counts 6 and 7.

Mrs. Esther Nelson testified concerning count 3 (false pretenses), count 11 (healing arts, Daniel, son), and count 12 (healing arts, herself). She stated that because of her son Daniel's difficulties in school and belligerence at home, and because the school recommended outside professional help, her husband made an appointment in November 1962 with appellant (Tr. 150-151). She observed a brass plaque outside appellant's office that bore the title "Doctor Vin-

cent J. Daly," an identical sign inside, and one on the door stating "Psychoanalyst" (Tr. 152-153). She testified that she saw several certificates on appellant's wall, including one from Austria or Bern stating appellant had received a degree from a university and one from Sir Guys Hospital (Tr. 153, 179); that she told appellant her son needed psychiatric help, and she asked him if he was a psychiatrist, and he said yes, he was (Tr. 155-156); that she wanted psychiatric, not psychological help, and a psychiatrist was a physician; that she stated to appellant, "That means, then, that you are a medical doctor?" and he said yes (Tr. 156). She vividly recalled appellant told her that he was in charge of a hospital in Europe during the war and that they would go right on operating during the fighting (Tr. 155; see Tr. 161). On two occasions the court asked her, first, if she would have gone to him if appellant had not told her he was a doctor of psychiatry, and second, if she would have taken her son if he had not; responding to each, she said that she would not (Tr. 159, 197). Of several certificates she identified as being on appellant's walls, the Sir Guys Hospital certificate gave her the impression that appellant had trained and interned there, and the American Association for Social Psychiatry certificate, making appellant a fellow therein, in part led her to believe he was a psychiatrist (Tr. 196-197). She stated that the Bern certificate was in English. She did not recall if she had mentioned that certificate to the grand jury, stating that there were so many that if she had failed to mention it, she evidently forgot (Tr. 202, 205). She testified that the certificates were constantly changed to different places on the walls (Tr. 198-199). Concerning the copy of "Christ and Mental Health" in appellant's office, she testified at first that she had read the introduction by Dr. S. Gordden Link but did not recall what it said, and she later said, after looking at it, that she did not read it (the completion of her statement being interrupted) (Tr. 176-177). She testified that on one occasion, when she called appellant's office to have her husband come home because she believed she had broken her arm, appellant volunteered to make arrange-

ments for her at the Washington Clinic (Tr. 186). She replied she had no idea how many hours of consultation were spent with appellant when defense counsel suggested some 140 hours total (Tr. 205). Concerning count 12, Mrs. Nelson testified that she was very upset and asked appellant for something to calm her down, whereupon he gave her a bottle of pills and told her to take them as prescribed on the physician's sample label, which specified one every four hours (Tr. 163-164). Having had pre-medics in college, she read the label and decided those pills were not what she needed and threw them away (Tr. 165). Concerning count 11, Mrs. Nelson could supply no concrete testimony that appellant had given her son medication (Tr. 162-163). The jury convicted on counts 3 and 12, and the court granted judgment of acquittal on count 11.

Mrs. Sybil Bale testified concerning counts 2 (false pretenses), 9 (healing arts, Charles, son) and 10 (healing arts, herself). She took her son Charles to appellant because of a behavior and reading problem, observing two signs each stating "Doctor Vincent J. Daly" on appellant's residence, and told appellant that Charles' principal said he needed psychiatric care (Tr. 210-215). Appellant represented to her during her first visit and at later times that he had received his training at Oxford University and interned at Sir Guys Hospital in London (Tr. 216, 219); appellant told her and her husband that Charles needed psychiatric care and he would treat him (Tr. 219); appellant stated he was a Colonel in the Army Reserve Medical Corps (Tr. 220) and that he was General Patton's personal physician during the Battle of the Bulge (Tr. 225); appellant said he was by mistake assigned to the gynecology ward at Fort Benning hospital while the gynecologist was assigned to the psychiatric ward, but later that was changed (Tr. 226, 240-241); and appellant said he headed the psychiatric department of Mississippi State Hospital (Tr. 239). In order to bring the involved testimony of Mrs. Bale into focus for the jury, the court directed some questions to her, and she responded that on her first visit appellant represented he was a psychiatrist, and that she

believed these representations and placed her son in his care as a result (Tr. 222). She later testified that appellant asked her if she knew how a psychiatrist worked. She said she did, and he replied, "Then you know how I will be treating your son," admitting, however, that appellant did not say in so many words, "I am a psychiatrist" (Tr. 242). She testified that if appellant told her he was a psychologist and not a psychiatrist, she would not have gone to him (Tr. 228, 248). She indicated she had read the introduction to "Christ and Mental Health"; however, after being shown the pamphlet and refreshing her recollection, she said she had not read it (Tr. 233-234). She saw several certificates in appellant's office, including the "American Military Order of Surgeons" and Sir Guys certificates which caused her to ask him where he had trained and interned (Tr. 239) and stated the certificates were moved about a bit (Tr. 251, 255). She also testified about the missing Bern, Switzerland, certificate she had seen behind his desk (Tr. 251). Defense counsel asked if she had signed a medical release for appellant which contained the statement "In granting this I am aware that Doctor Daly is not a physician." She testified that she signed the release but that *that typed sentence was not on it when she signed it* (Tr. 229-230, 290). A questioned documents examiner of the FBI testified that the quoted line was not prepared at the same time that the lines above and below it were prepared and that the typewriter had been cleaned between the separate entries (Tr. 818-823). It was later brought out by a defense witness, Miss Edwina Hallman, on cross-examination that the release had been missing from the appellant's files until two months before trial when *appellant* found the form in the file with the quoted line typed on it (Tr. 783, 787).

Concerning count 10, Mrs. Bale testified that in late September or early November she was upset and told appellant she had a "sick headache," whereupon he told her it was her nerves and he gave her a physician's sample of pills from his desk drawer to be taken once each day (Tr. 226-228). Concerning count 9, Mrs. Bale testified

that she was not in the treatment room with her son and appellant, and she did not know what happened there; thus the court granted judgment of acquittal on count 9.

Although Colonel Edward L. Bale said he could not recall if appellant "ever made a direct statement that he was a psychiatrist" (Tr. 266), he amply corroborated Mrs. Bale as to appellant's many representations, and also indicated other representations that induced both of them to believe appellant was a psychiatrist and a medical doctor (Tr. 261, 264-267, 269-270, 274, 279-280). The jury convicted on counts 2 and 10.

Mrs. Zaviola Sokol testified concerning counts 5 (false pretenses), 16 (healing arts, Vida, daughter), 17 (healing arts, herself), 24 and 26 (possession of dangerous drugs), 25 and 27 (delivery of dangerous drugs to Mrs. Sokol). The court granted judgment of acquittal on count 16 and the jury convicted on all the other counts. Her daughter had a behavior and discipline problem, and she sought psychiatric care, advising appellant of this (Tr. 296-297, 301, 313); appellant represented he was a psychiatrist (Tr. 301-302, 305-306, 326). On cross-examination she was asked to explain her failure to respond that appellant had represented to her that he was a psychiatrist when she was examined at the preliminary hearing (Tr. 327-328). She explained that she was upset and nervous at the hearing (Tr. 328, 333) and that, although appellant did not directly represent *to her* he was a psychiatrist, appellant did make that representation to her husband *in her presence* (Tr. 328, 350-351). Concerning Mrs. Sokol's prior conviction in New York, at the outset of direct examination, Government counsel in the presence of the jury asked her if, in regard to her divorce, she ran into some criminal prosecution. She responded that she did in connection with allotment checks that had come to her after her divorce (Tr. 293-294). The court advised that this was a question of impeachment for defense counsel (Tr. 294). At a later point, the court under its own initiative removed the jury and examined Mrs. Sokol concerning preliminary hearing testimony about her conviction (Tr. 306-307). She responded

that at the hearing the court had asked her name, how long she had lived in Georgia, and "Were you at any time ever convicted of a crime in the *State of Georgia?*" to which she replied no, and the court then said, "Step down from the witness box" (Tr. 308). She was not asked about any crime in New York State at that time. The question at trial however, was whether she had had *some criminal prosecution*, and this led to disclosure of the New York conviction (Tr. 307-308). Later in the trial the court and counsel were supplied a transcript of the pertinent preliminary hearing testimony. Defense counsel sought to examine Mrs. Sokol, arguing to the court that he should be allowed to question her on her previous testimony, contending "she knew what we were looking for" (Tr. 349). The court stated, in essence, that the preliminary hearing questions "weren't asking her for that", *i.e.*, for her New York conviction, which defense counsel acknowledged (Tr. 349). However, defense counsel stated to the court, "Your Honor knows as well as I that it was a patent attempt to mislead the court"; the court said it did not think so, and defense counsel agreed to abide by the ruling (Tr. 350). Later in the trial the judge said he was in error about thinking the record of the preliminary hearing might show misrepresentation by Mrs. Sokol and said that Mrs. Sokol did not tell an inconsistent story at trial because the question at the preliminary hearing specifically asked about a conviction *in Georgia* (Tr. 778).

Mr. Stephan Sokol testified that he observed the brass plaque outside appellant's building stating "Doctor Vincent J. Daly" (Tr. 363-364); that appellant's receptionist referred to him as "the Doctor" (Tr. 365, 372); that he told appellant he was referred to him as a child psychiatrist, from which this colloquy followed:

> MR. DWYER [appellant's counsel]: Do you know what a doctor of psychiatry is?
>
> MR. SOKOL: Yes, I know.
>
> MR. DWYER: Then you do know he is a doctor of medicine?
>
> MR. SOKOL: Yes, I do. (Tr. 369-370)

Appellant told him he had completed his preliminary diagnosis of his daughter, stating she had a schizophrenic tendency but would be fully recovered after further treatment, investigation and diagnosis (Tr. 372-373). Mr. Sokol noticed the certificates on the walls "which looked like they were from a university" (Tr. 367-368).

Mr. Vincent Schermerhorn testified concerning counts 4 (false pretenses) and 15 (healing arts, himself). He testified that he had been in several mental hospitals in the late 1930's, released in 1941; that he had not been in a hospital since 1941 but named three psychiatrists who saw him periodically since 1941, including Dr. Benjamin Karpman, then Chief Psychotherapist at Saint Elizabeths (Tr. 381-382). There were lapses of six to ten years since 1941 between periods when he consulted psychiatrists (Tr. 392). He testified that Dr. London, an analyst and psychiatrist, referred him to appellant (Tr. 382). He observed, outside appellant's building, the sign which stated "Doctor Vincent Daly"; he saw several certificates in appellant's office, including one indicating his acceptance as a "good fellow in a society dealing with surgeons"; appellant represented he had been General Patton's Senior Medical Officer at the Battle of the Bulge and that he was Superintendent of a hospital in West Virginia (Schermerhorn believed it was in Huntington) (Tr. 382-385). The witness testified that when he saw the "surgical certificate" this colloquy occurred: Witness: "My goodness, are you a surgeon too?" Appellant: "Oh yes, I performed quite a few battlefield operations. As a matter of fact, I still keep my hand in it. I am going to perform an operation tomorrow"; Witness: "Is that so? Where?"; Appellant: "Walter Reed Hospital." (Tr. 385.) Contrary to the suggestion in appellant's brief (p. 6) that this witness "also mentions, or so it would appear, the 'Bern' certificate," the witness indicated that appellant "said he had spent nine years in the medical school at some place called Faculiti Berni, Austria, I believe" (Tr. 384-385). When asked what treatment appellant represented he would give, the witness said appellant stated, "You know something

about analysis. We will just go on" (Tr. 386); whereupon appellant treated him until the publication of a newspaper story about appellant's arrest. The witness testified that although he did not recall any more certificates than the Government showed at trial, "there may have been more", and none stated appellant was a psychologist (Tr. 393). The witness responded to the question of what he believed appellant to be, based on his first conversation with appellant, that appellant was a "psychoanalyst with a psychiatric background, and behind that a medical background . . ." (Tr. 388). He stated further that he knew the difference between a psychologist and a psychiatrist and would not have placed himself in appellant's care if he had known appellant was only a psychologist (Tr. 389). The court provided a bench conference for defense counsel to argue his objection to the court's ruling that inquiry as to how much money the witness had paid other psychiatrists was irrelevant. The witness testified on cross-examination that he had taken drugs which had been prescribed for him by doctors at different times, including a prescription for Librium, a tranquilizer, which he was taking up to the time when he went to appellant (Tr. 400-401); that he had placed his prescription for Librium in a bottle he had at his house which bore the name of William Bressler, an acquaintance, Schermerhorn not recalling what happened to the original Librium container (Tr. 403-405); and that when he told appellant he had stopped taking Librium, appellant said: "Well, if you don't want this Librium that you have, I have a lot of people who can't afford this stuff. Why don't you give them to me?", which the witness did (Tr. 402).

Additionally concerning count 15, Schermerhorn testified he had been going to appellant for several weeks and he had violent headaches lasting two and three days a time. Appellant gave him some pills, which appellant said contained codeine and barbitol. They were taken from a container by appellant and placed in a small bottle (Tr. 409). Evidence was also elicited of moneys paid to appellant as charged in the false pretense counts. The jury convicted on counts 4 and 15.

The Government introduced in evidence, without objection, appellant's official transcript from the University of Detroit, the final entry of which states "February 1941, Dismissed" (Tr. 425). Defense counsel objected to the introduction of certain documents on grounds of lack of cross-examination and of irrelevancy, but the objection was overruled by the court (Tr. 411, 425-431).[2] During the course of testimony that no record existed showing that a passport ever had been issued to appellant, defense counsel made an objection which caused the court to ask him some questions in the presence of the jury to clarify the basis of his objection. In the presence of the jury, defense counsel told the court that it had put the defense in a bad light, to which the court said it would not put anyone in a bad light, and after defense counsel explained the point of his cross-examination, the court agreed to his point (Tr. 444-445). Defendant's Army records showed he entered service as a private and never served overseas (Tr. 448, 452). There was no disputation of the fact that appellant was not a psychiatrist or medical doctor (See Tr. 434).

Detective Sergeant John Panetta of the Narcotics Squad, Metropolitan Police Department, testified that appellant stated that he had attended a University of Bern, Switzerland (not physically attended), receiving a degree "through a deal with the Army" (Tr. 419). He stated that upon executing the search and arrest warrants he observed signs on the building and on the wall beside appellant's door reading "Dr. Vincent J. Daly" (Tr. 454). He observed and seized two cartons on the office floor partially filled with various drugs marked "Physician's samples" and certificates on the walls (Tr. 455), and a desk drawer full of drugs. Defense counsel agreed to stipulate that all drugs that the chemist states are dangerous drugs under the Dangerous Drug Law are such (Tr. 460-461, 483-485).

---

[2] In addition to the certificates of Dr. V. Moine, of whom appellant states it does not appear he was custodian of University of Bern records (Brief for Appellant, 7), is a certificate by the Secretary of the Dean of the University of Bern, Switzerland, that officials were unable to find the name of Vincent J. Daly anywhere in their records (Tr. 431).

Defense witnesses were permitted to testify that they had been in consultation with appellant, giving the length of time of consultation and the reason therefor, as well as to state their familiarity with his office (contrary to the allegation in appellant's brief at p. 7); however, the court sustained Government objection, based on relevancy, to questions about representations made or not made *to these witnesses* and about whether appellant supplied *them* with medication. Nevertheless, several witnesses responded to these questions before the objection was made or sustained (Tr. 572, 577-578, 591-592, 630). Father Lloyd Goodrich testified that he personally spent about three evenings a week, an hour each, at appellant's office, though he denied the consultations were for himself (Tr. 519). He testified he talked with the Nelsons about appellant in March or April 1963; however, the Nelsons first went to appellant in November 1962 (Tr. 521). Likewise Dr. Christopher Photakis testified for the defense and said he went to appellant's office "several times a week," "mostly socially" (Tr. 526, 529). Dr. Melchior Savarese made a claim about appellant's clinical experience in a letter he wrote to newspapers, over his signature as interim president of the American Association for Social Psychiatry, stating: "Publicity given Daly by a Washington reporter has only proved that Daly has had more clinical experience than most of the men in the psychiatric field in Washington" (Tr. 552-554). He testified he was not a member of the association, that he was interim president for only one month, that he became interim president at appellant's request, that part of the information in the letter came from appellant, and that the letter was written or typed in appellant's office (Tr. 555, 557, 564-566). The court examined Dr. Savarese to clarify what the organization was and what the witness' relationship to it was, whereupon defense counsel initiated an exchange with the court by stating that the court was "implying the organization is fictitious," which the court denied (Tr. 561). Dr. Edward Mazique testified that appellant asked him to supply physician's samples to appellant for an African mission hospital,

which he did on two occasions, but he did not know what appellant did with the samples (Tr. 662, 664).

Martha Lou Parker testified that she went to appellant for counseling almost every day in 1962 and worked for him part time from the latter part of 1962 to May of 1963 (Tr. 601-602) and apparently felt strongly about appellant (Tr. 583, 605, 607). Similarly, Carolyn Nystrom testified she had been going to appellant three times a week for the previous three years and worked part time for appellant without salary (Tr. 667-668, 689). Coincidentally she was present on Saturdays to talk with the Nelsons and the Sokols about appellant (Tr. 695), on several evenings to talk with Mr. Schermerhorn (Tr. 696-697), and on her lunch hour (from work elsewhere) when "it just so happened" that she saw Mrs. Sokol handling medicines in the office (Tr. 697-698).[3] She admitted that the pamphlet article which she had discussed with various Government witnesses did not specifically state that appellant was a psychologist (Tr. 693), and she admitted discussing her testimony with Martha Lou Parker (Tr. 703). In rebuttal, Mrs. Sokol stated that she went to appellant's on a Saturday, for the first visit, but she never went to appellant's office again on a Saturday. She did not know Misses Nystrom or Parker and talked only with appellant and Miss Hallman on that single Saturday visit (Tr. 810-811).

Dr. Link testified for the defense, on direct examination, that he always knew appellant as a psychologist, made referrals on that basis, and knew the difference between a psychologist and a psychiatrist or medical doctor (Tr. 798). During cross-examination Government counsel asked the witness if he saw appellant's name listed in the index of a booklet shown to the witness. Based on Dr. Link's testimony on direct examination, it is clear that the former question on the pamphlet was to be part of a series of questions to impeach Dr. Link, *i.e.*, to show that he knew ap-

---

[3] To clairfy the misleading comment in appellant's brief (p. 9) that "Mrs. Sokol . . . removed certain of its contents" (medicines), according to Miss Nystrom, the witness did not testify that Mrs. Sokol took any pills from the office. See Tr. 677-678, 699.

pellant was held out as a doctor. However, the witness immediately responded (to a question calling only for a yes or no reply): "Yes, I remember at the time I explained about it to Dr. Miller who edited the issue. I didn't have anything to do with editing this issue. You refer, of course, to the M.D. after his name. That was either a typographical error or stupidity" (Tr. 800). The booklet was not submitted as evidence against appellant but for impeachment of the defense witness, who offered his explanation of the entry. (See Argument II, *infra.*) He also testified, on cross-examination, that appellant did not have a hand in incorporating the American Association for Social Psychiatry (Tr. 800-801). For impeachment the Government introduced the association's articles of incorporation showing appellant's name as an incorporator (Tr. 803-804).

In rebuttal, a Government witness, Dr. Frank Fagan, M.D., testified that he used appellant's office *only* as an address of record, to maintain his license since he was no longer able to practice; that his name was not on the door, he saw no patients there, never practiced medicine there, and kept no medical supplies at appellant's office (Tr. 805-807). There was testimony that only appellant was the lessee of his apartment-office and that only he paid rent (Tr. 802-803).

STATUTES AND RULES INVOLVED

Title 2, District of Columbia Code, § 101, provides in pertinent part:

> (a) "Disease" means any blemish, defect, deformity, infirmity, disorder, disease, or injury of the human body or mind, and pregnancy, and the effects of any of them.
>
> (b) "The healing art" means the art of detecting or attempting to detect the presence of any disease; of determining or attempting to determine the nature and state of any disease, if present; of preventing, relieving, correcting, or curing, or of attempting to prevent, relieve, correct, or cure any disease; . . . and of doing or attempting to do any of the acts enumerated above . . . .

(c) "To practice" means to do or to attempt to do, or to hold oneself out or to allow oneself to be held out as ready to do, any act enumerated in subsection (b) of this section as constituting a part of the healing art, for a fee, gift, or reward, or in anticipation of any fee, gift, or reward, whether tangible or intangible.

Title 2, District of Columbia Code, § 102, provides in pertinent part:

No person shall practice the healing art in the District of Columbia who is not (a) licensed so to do . . . .

Title 22, District of Columbia Code, § 1301, provides:

Whoever, by any false pretense, with intent to defraud, obtains from any person anything of value, or procures the execution and delivery of any instrument of writing or conveyance of real or personal property, or the signature of any person, as maker, indorser, or guarantor, to or upon any bond, bill, receipt, promissory note, draft or check, or any other evidence of indebtedness, and whoever fraudulently sells, barters, or disposes of any bond, bill, receipt, promissory note, draft, or check, or other evidence of indebtedness, for value, knowing the same to be worthless, or knowing the signature of the maker, indorser, or guarantor thereof to have been obtained by any false pretense, shall, if the value of the property or the sum or value of the money or property so obtained, procured, sold, bartered, or disposed of is $100 or upward, be imprisoned not less than one year nor more than three years; or, if less than that sum, shall be fined not more than $200 or imprisoned for not more than one year, or both. Any person who obtains any lodging, food, or accommodation at an inn, boarding-house, or lodging-house, without paying therefor, with intent to defraud the proprietor or manager thereof, or who obtains credit at such an inn, boarding-house, or lodging-house by the use of any false pretense, or who, after obtaining credit or accommodation at such an inn, boarding-house, or lodging-house, absconds or surreptitiously removes his baggage therefrom without paying for his food, accommodation, or lodging, shall be deemed guilty of a misdemeanor, and upon

conviction thereof in the municipal court for the District of Columbia be fined not more than $100 or imprisoned not more than six months, or both, in the discretion of said court.

Title 33, District of Columbia Code, § 701, provides in pertinent part:

(5) The term "practitioner" means any person duly licensed by appropriate authority and, in conformance with the law, licensed to prescribe dangerous drugs, and to administer and use dangerous drugs in the course of his professional practice.

Title 33, District of Columbia Code, § 702, provides in pertinent part:

(a) Except as otherwise provided by sections 33-703 and 33-704, the following acts, the failure to act as hereinafter set forth, and the causing of any such act or failure are hereby declared unlawful:

(1) The delivery of any dangerous drug unless—

. . . .

(D) such dangerous drug is delivered by a practitioner in the course of his practice and the immediate container in which such drug is delivered bears a label on which appears the directions for use of such drug, the name and address of such practitioner, the name and address of the patient

. . . .

(4) The possession of a dangerous drug by any person, unless such person obtained such drug on the prescription of a practitioner or in accordance with subparagraph (D) of paragraph (1) of this subsection.

Title 33, District of Columbia Code, § 703, provides:

Nothing in this chapter shall apply to a compound, mixture, or preparation which is delivered or acquired in good faith for the purpose for which it is intended and not for the purpose of evading the provisions of this chapter if—

(1) such compound, mixture, or preparation of barbituric acid, its salts and derivatives shall be de-

cared by rule or regulation duly promulgated by the Commissioners after reasonable public notice and opportunity for hearing to have or to contain no habit-forming properties and not to have a dangerous toxic or hypnotic or somnifacient effect on the body of a human or animal; or

(2) such compound, mixture, or preparation of amphetamine, desoxyephedrine, phenolethylamine, or their salts or derivatives shall be found and declared by rule or regulation duly promulgated by the Commissioners after reasonable public notice and opportunity for hearing to contain in addition to such drug or its salts and derivatives some other drug or drugs causing it to possess other than an excessively stimulating effect upon the central nervous system and to have no habit-forming properties or dangerously toxic effect upon the body of a human or animal.

Title 33, District of Columbia Code, § 704, provides in pertinent part:

The provisions of subparagraphs (1)(A) and (1)(D) and paragraph (4) of section 33-702(a) shall not be applicable (1) to the delivery of dangerous drugs to persons included in any of the classes hereinafter named, or to agents or employees of such persons, for use in the normal or usual course of their business or practice or in the performance of their official duties, as the case may be; or (2) as to the possession of dangerous drugs by such persons or their agents or employees for such use:

(A) Pharmacists.

(B) Practitioners.

(C) Persons who procure dangerous drugs (i) for handling by or under the supervision of pharmacists or practitioners, or (ii) for the purpose of lawful research, teaching, or testing and not for resale.

(D) Hospitals which procure dangerous drugs for lawful administration or use by practitioners.

Rule 8(a), Federal Rules of Crminal Procedure, provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Rule 27, Federal Rules of Criminal Procedure, provides:

> An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions.

Rule 32(a), Federal Rules of Criminal Procedure, provides:

> Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

Rule 32(c), Federal Rules of Criminal Procedure, provides:

> (1) The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.
>
> (2) The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correc-

tional treatment of the defendant, and such other information as may be required by the Court.

Rule 44, Federal Rules of Civil Procedure, provides in pertinent part:

> (a) An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign state or country in which the record is kept, and authenticated by the seal of his office.
>
> (b) A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

SUMMARY OF ARGUMENT

I

The counts of the indictment were of the same or similar character, all concerning the appellant only, covered substantially contemporaneous periods of time, and involved much common evidence. The complaining witnesses on the felony counts were also witnesses on the misdemeanor counts. Joinder rests in the trial court's discretion, and

where the record demonstrates that separate crimes were charged and the trial was carefully compartmentalized according to each count pertaining to each complaining witness, so that the jury could fairly weigh the evidence on each count, there was no abuse of discretion. There is no evidence nor any claim by appellant that he was confounded or embarrassed in making his defense as a result of joinder. Since the felony counts were in fact mutually corroborative, joinder was not improper because the jury might view them as corroborative. Nevertheless, the evidence on each count was sufficiently strong to convict without benefit of mutual corroboration. Appellant has failed to show actual prejudice by joinder.

Appellant offered no authority nor laid any basis for his request for the criminal records of all complaining witnesses. Appellant knew all the complaining witnesses well before trial and admitted he had access to police records, so that his request was nothing more than a broad fishing expedition for possible impeachment information against prospective witnesses. Only in the case of Mrs. Sokol did he offer any foundation for his request for FBI records, and the information he sought was brought out by the Government during trial.

II

The evidence established that appellant knowingly and falsely represented to the complaining witnesses that he was a psychiatrist and an M.D., with intent to defraud them, and that they in fact relied upon his representations and paid him in excess of $100 in each case. He held himself out as a psychiatrist and medical doctor ready to perform or to attempt to perform acts of diagnosing, treating or prescribing with the object of curing, correcting, or relieving, or attempting to cure, correct, or relieve a disease, as defined by statute. Appellant had physical possession of dangerous drugs which he kept for his own use in that he delivered some drugs to some patients. The evidence was such that the court could not say that beyond all doubt the verdict must be not guilty; thus he properly refused

to grant judgment of acquittal on several counts. A defense witness, during cross-examination, went beyond the scope of a proper impeachment question and stated that he saw "M.D." listed after appellant's name in a book. Since the witness stated such listing was a typographical error or "stupidity," since there was no effort to connect appellant with the listing, and since there was ample independent evidence that appellant represented himself to be a psychiatrist and medical doctor, appellant's substantial rights were not prejudiced so as to have required a mistrial.

Consideration of the length of trial, of the many witnesses and issues, of the periodic questions of the court directed toward clarifying testimony, and of the exchanges between the court and Government and defense counsel over objections and the like, makes clear that the court's conduct of the trial was intended to guide and assist the jury by assuring as simple and clear a presentation of evidence as possible. There is no evidence that the court was hostile to the appellant, any witness or counsel, nor that his conduct or demeanor favored one side or the other. The court properly refused to read 33 D.C. Code §§ 703 and 704 to the jury because the evidence in the case removed those sections from any fact issue.

In order to disprove certain representations appellant made, the Government introduced documents in substantial compliance with Rule 27. The rules do not require that the affiant testify or be subject to cross-examination, nor that the records searched be complete, incompleteness going only to weight. Assuming that a statement of an affiant's recollection (that appellant was not in attendance at Sir Guys Hospital) was objectionable as hearsay this cannot constitute reversible error in the face of ample admissible evidence of the principal false representations, namely, that appellant was a psychiatrist and medical doctor.

The court properly denied appellant's offer to prove his "habit" of not misrepresenting himself to other patients, where the relationship between appellant and the other patients was dissimilar to his relationship with the com-

plaining witnesses, the proof was of little or no probative value and would entail a multitude of collateral issues, and the offer did not pertain to "habit" evidence, in fact, since it concerned volitional rather than automatic behavior.

The trial court afforded appellant the opportunity to make any statement in his behalf before sentencing. The sentence imposed was one to three years, whereas he could have received up to twelve years on the four felony counts alone. The trial court stated that the sentence was based primarily on the crimes committed, thus negating any claim that the sentence was predominantly motivated by the probation report. A probation report may be treated as a confidential document, and the court may deny to appellant the trial or examination of the many collateral issues raised by such a report as well as access to the report. The court was not constrained to accept the representations of fact in appellant's document as true, nor did it have to order an independent inquiry to verify appellant's claims. The court had access to the probation report and appellant's document so that the court was able to evaluate the weight to give to the information in the probation report, and there is no basis for this Court to assume that the court abused its discretion in sentencing appellant.

ARGUMENT

I.(a) The trial court did not err in denying appellant's motion for severance or election.

(Tr. 1-27, 68-70, 75-102, 129, 139-142, 150-156, 159, 161-165, 176-177, 179, 186, 196, 199, 202, 205, 210-216, 219-220, 222, 225-230, 233-234, 239-242, 248, 251, 255, 261, 264-270, 274, 279-280, 290, 293-297, 301-302, 305-308, 313, 326-328, 333, 349-351, 363-365, 367, 372-373, 381-389, 392-393, 400-405, 409, 485, 489-495, 783, 787-788, 818-823, 840, 927-935, 946-955, 973-976.)

Appellant moved, in a pre-trial motion, for severance of counts or a requirement that the Government elect, claiming primarily that the indictment was cast in several distinct crimes such that appellant might be convicted on a totality of evidence rather than on specific crimes. The

motion was denied. All pre-trial motions were renewed and denied at the beginning of the trial, at which time the Government moved to dismiss six counts, leaving twenty-one counts for trial. However, no motion for severance or claim of prejudice due to joinder was made by appellant at the end of the Government's case, at the end of the appellant's case, nor before submission of the ultimate fifteen counts to the jury. (At the end of the Government's case, on the Government's motion, two more counts were dismissed, and the court granted judgment of acquittal on four other counts).

The counts charged are of the same or similar character as specified in Rule 8(a), F.R. Crim. P., all rooted in appellant's representations and his holding himself out as being a psychiatrist and medical doctor, and acts related thereto. All of the healing arts and delivery of dangerous drugs counts submitted to the jury pertained not only to the same complaining witnesses (or their children) who were the victims of the false pretenses charged in the first five counts, but also concerned acts of reliance, treatment, and so on, which resulted from the belief that appellant was a psychiatrist and medical doctor. (See Counter-statement, *supra.*) Furthermore, the same complaining witnesses were witnesses to appellant's possession of the dangerous drugs which he delivered to them, and the Bale, Nelson, Schermerhorn and Sokol counts all concerned substantially contemporaneous periods of time.

Appellant's claim of error is that the evidence as to each count, considered of itself, was too weak to sustain the burden of proof, and that the harm lay in the accumulation of testimony. The trial record amply demonstrates the contrary, namely, that the trial from beginning to end was compartmentalized according to each count pertaining to each of the principal complaining witnesses (see the Government's opening argument specifying each count and evidence pertinent thereto; note particularly the Government's closing argument charging fifteen specific violations and telling the jury it must relate evidence to each specific count, Tr. 840). The trial court maintained

close supervision over the presentation of the evidence, examination of witnesses and counsel's argument, clearly to assure a lucid and unambiguous presentation of facts for the jury.[4] The trial court carefully compartmentalized each count, first reading the indictment *in toto* (fifteen counts, Tr. 927-35), and then rendering specific instructions on each crime, reading the pertinent statute and charging the jury on each count relevant thereto (Tr. 946 *et seq.*). The jury deliberated at length (3:07 p.m. to 4:27 p.m. on January 28 and 10:00 a.m. to 4:00 p.m. on January 29) and made specific requests for the testimony of Mrs. Athanas, Mrs. Nelson, Mrs. Bale and Mr. Schermerhorn, and also the case histories of the Bale, Nelson, Sokol, and Athanas children, the Schermerhorn case history, and the instructions of the court, to use during their deliberations.

Appellant's alleged discrepancies[5] in the testimony seem to be based on the belief that only if appellant said to each complaining witness, in expressly these words, "I am a medical doctor; I am a psychiatrist," could a case of false pretenses be made out. Patently this is not the law. See Argument II, *infra*.

---

[4] That the court endeavored to avoid harmful "accumulation" of evidence by insuring specificity and pertinence is amply demonstrated by the transcript wherein the court's questions were reasonable and often to the clear advantage of appellant (Tr. 79-84, 87-89, 90, 94-98, 101-102, 129, 196-197, 222, 305, 466). The court's judgment of acquittal on counts 1, 9, 11 and 16, as well as the entire trial record, demonstrates that its attitude and action was affected only by specific evidence and not by appellee's alleged accumulation of witnesses.

[5] See appellant's brief, p. 19, and the Counterstatement, *supra*, for Mrs. Sokol's testimony. It is noted that appellant's statement of points contains an objection to the court's limitation of cross-examination (Point II, apparently with specific reference to Mrs. Sokol), but appellant apparently abandons that point since he offers no argument on it. In any event, the collateral issue of scope of cross-examination pertains clearly to trial court discretion, which was properly exercised throughout the trial. See Counterstatement, Sokol testimony, *supra*; Tr. 293-294, 306-308, 349-350, 778; court's instruction re Sokol conviction, Tr. 954-955, and Transcript of Proceedings before Judge Curran, June 14, 1963. Appellant states in his brief at p. 20 that Government counsel reminded the court of testimony of *another* witness, whereupon the court let the Schermerhorn count stand. This is a misstatement because the testimony mentioned to the court was that of Schermerhorn (Tr. 383-385, 491).

It is well settled in this jurisdiction that separate crimes may be joined if a defendant can be fairly tried on all charges at once; this determination is in the sound discretion of the trial court subject to review only for clear abuse. *Monroe* v. *United States,* 98 U.S. App. D.C. 228, 234 F.2d 49, *cert. denied,* 352 U.S. 873 (1956); *Robinson* v. *United States,* 93 U.S. App. D.C. 347, 210 F.2d 29 (1954); *Nestlerode* v. *United States,* 74 App. D.C. 276, 122 F.2d 56 (1941).[6] Since this is true of the joinder of several defendants in several counts (each count not embracing all defendants) where the likelihood of prejudice as to some or all is greater, then it is much more true of the trial of one defendant solely embraced in all counts as in the case of appellant. *Schaffer* v. *United States,* 362 U.S. 511 (1960); *Monroe* v. *United States, supra; Robinson* v. *United States, supra* (two defendants); *Wiley* v. *United States,* 277 F.2d 820 (4th Cir.), *cert. denied,* 364 U.S. 817 (1960); *United States* v. *Welsh,* 15 F.R.D. 189 (D.D.C. 1953). Appellant's major argument is, in essence, that he is more likely to be convicted by one jury passing on all counts than if he were tried by fifteen separate juries each passing on a single count. This rationale was expressly rejected in *Robinson, supra,* where the Court said that the "mere fact that appellant might have had a better chance of acquittal if tried separately from Ward does not establish his right to a severance."[7]

All that appellant has done is to allege a series of conclusory *claims* of prejudice, citing inapposite cases, but failing in any way to show actual prejudice.[8] He has not carried his burden of showing prejudice. *Schaffer* v.

---

[6] See also *Hall* v. *United States,* 83 U.S. App. D.C. 166, 168 F.2d 161, *cert. denied,* 334 U.S. 853 (1948); *Wheeler* v. *United States,* 82 U.S. App. D.C. 363, 165 F.2d 225 (1947), *cert. denied,* 333 U.S. 829 (1948).

[7] See also *Miciotto* v. *United States,* 91 U.S. App. D.C. 102, 198 F.2d 951 (1952).

[8] As the court said in *Wiley, supra* at 824, "[T]here was no prejudice to the three defendants in trying them together other than that which necessarily attends every joinder of defendants for trial under the established procedure". *Cf. United States* v. *Rabin,* 316 F.2d 564 (7th Cir. 1963).

United States, supra. Public policy considerations in the administration of justice require that severance be denied in the absence of a clear showing of prejudice against which the trial court will not be able to afford protection.[9] Appellant not only has failed to make a clear showing of prejudice, but also the trial record amply demonstrates that the court could and did afford protection to appellant throughout the trial. Additionally, granting severance would have posed a great burden for the Government in that much of the same evidence and many of the same witnesses would have to be used in each trial.

Appellant relies on *McElroy* v. *United States,* 164 U.S. 76 (1896) (which involved six defendants, not all involved in the counts charging distinct and separate crimes, each crime provable by different evidence) and, interestingly, on *Kidwell* v. *United States,* 38 App. D.C. 566 (1912) (involving *one* defendant), the latter case, at 569, expressly declaring that *McElroy* does not control the single defendant situation in *Kidwell* (and, by inference, the instant case). Although the Supreme Court in *McElroy* considered prejudicial the joinder of the six defendants, the court stated that "the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment . . . ." This is apposite to the felonies charged against appellant herein. The gist of *Kidwell* was the clear-cut prejudice of "felon[ies] of this enormity" (two separate acts of carnal knowledge, on two different females, both of whom testified), each crime separate and totally unrelated, where one may be viewed by the jury as corroborative of the other, *when, in fact, no corroboration exists.* As stated before, the trial record shows that the evidence relative to each count against appellant was ample to sustain the jury's verdict on each count, regardless of the corroborative nature of the felony count evidence. Moreover, since appellant's intent was an issue in each false pretense charge, and since the evidence on each was

---

[9] See 4 BARRON, FEDERAL PRACTICE AND PROCEDURE, § 2011 (1951); *Smith* v. *United States,* 86 U.S. App. D.C. 195, 180 F.2d 775 (1950).

so connected with the others in point of time and circumstance so as to throw light upon appellant's intent, the charges were in fact corroborative and not objectionable for the reason given in *Kidwell.*[10] The counts against appellant were in fact so circumstantially and evidentially related that there was considerable overlapping of evidence. In any event, where there is no evidence of prejudice from the joinder, as in the instant case, the corroboration or criminal disposition issue does not require reversal of trial court discretion as to joinder. *Cf. Dunaway* v. *United States,* 92 U.S. App. D.C. 299, 302, 205 F.2d 23, 26 (1953). The *Peckham,*[11] *Maurer,*[12] *Monroe* and *Dunaway* cases (cited in appellant's brief at p. 22) are in no way inconsistent with the Government's claim of non-prejudice in appellant's case (where the jury convicted on all counts) where in fact no showing of prejudice has been made. See *Robinson* and *Nestlerode, supra.*

The *Cross*[13] case cited by appellant is clearly distinguishable because Cross was demonstrably embarrassed and confounded in making his defense and given no opportunity to substantiate his claim of prejudice with respect to joinder of distinct felonies having nothing in common except the nature of the crimes. Likewise, in *Drew* v. *United States,* —— U.S. App. D.C. ——, 331 F.2d 85 (1964), on which appellant also relies, this Court found in the trial record strong evidence of prejudice from the joinder of distinct crimes bearing superficial similarity, the evidence as to one in no sense corroborative of or relevant to the other, and found that the witnesses' testimony and the prosecutor's summation indicated confusion as to the crimes and a lumping together of evidence. No case *requires* that counts be "simple and distinct" to sustain a joinder. As the court

---

[10] See *Boyer* v. *United States,* 76 U.S. App. D.C. 397, 132 F.2d 12 (1942). *Ward* v. *United States,* 110 U.S. App. D.C. 136, 289 F.2d 877 (1961), cited in appellant's brief at p. 22, concerned multiple defendants.

[11] *Peckham* v. *United States,* 93 U.S. App. D.C. 136, 210 F.2d 693 (1953).

[12] *Maurer* v. *United States,* 95 U.S. App. D.C. 389, 222 F.2d 414 (1955).

[13] *Cross* v. *United States* —— U.S. App. D.C. ——, —— F.2d ——, No. 17596, decided March 26, 1964.

said in *Drew*, "[E]ven where the evidence would not have been admissible in separate trials, if, from the nature of the crimes charged, it appears that the prosecutor might be able to present the evidence in such a manner that the accused is not confounded in his defense and the jury will be able to treat the evidence relevant to each charge separately and distinctly, the trial judge need not order severance or election at the commencement of the trial." 331 F.2d at 91-92. There is no evidence that appellant was confounded or that the jury was unable to deliberate properly over the evidence presented.

(b) The trial court did not err in denying appellant's request for criminal records on all prospective Government witnesses.

Appellant's argument on this point[14] constitutes an omnibus attack on allegedly unduly limited criminal discovery, having little relevancy to the case at hand and completely unsubstantiated by any authority. Notwithstanding the fact that there was no basis for requiring the Government, in a non-capital case, to submit to the appellant a list of proposed witnesses,[15] the court did order that, as the Government determined which witnesses might be called, such a list be submitted to appellant before trial. Furthermore, of the thirteen witnesses called by the Government in its case in chief, seven were the principal complaining witnesses named in the indictment, all known to appellant well before trial. Appellant could not have been surprised by the testimony of an eighth witness, the arresting officer, Sergeant Panetta. Of the remaining five witnesses, one testified only to appellant's scholastic record at the University of Detroit (uncontested testimony), one testified only to the appellant's Army records, and one testified only to the Passport Office records as to appellant.

Although appellant argues in his brief that he had no means of determining whether Government witnesses had

---

[14] Brief for Appellant, 23-24.

[15] See *United States* v. *Frank*, 23 F.R.D. 145 (D.D.C. 1959).

criminal records in various jurisdictions, he conceded to the trial court that he did have access to police records.[16] Appellant's request for FBI records on a prospective witness was clearly a blanket fishing expedition in quest of possible material that might be usable for the impeachment of such witness, without offering sufficient foundation for such a request. Were such a request granted, the implications would be that the Government would have to determine prematurely what witnesses it planned to use, or to supply the criminal records of all possible witnesses regardless of how many would not in fact be called. Moreover, the fingerprints of all such witnesses would have to be obtained because positive identification from FBI records can be made only on that basis, and not through name alone.

In an unusual twist, appellant's counsel cites the Sokol testimony[17] where Government counsel intentionally elicited from the witness testimony of a criminal conviction (clearly to appellant's advantage and exactly what he sought in his pre-trial motion), claiming he otherwise would never have learned of this conviction. What counsel would have learned is conjectural and largely a matter of diligence, but it is clear that Government counsel sought to apprise the jury of this fact, which the court expressly stated, before the jury, was a matter of impeachment to be brought out by the defense. (See Counterstatement, *supra*, the Sokol testimony, on the ruling of the court about further defense use of this testimony.)

Neither the Sixth Amendment nor Rule 16, F. R. Crim. P., affords any substance to appellant's claim, and there is authority in this jurisdiction that the denial of appellant's request for the FBI records was proper. *Simms* v. *United States*, 101 U.S. App. D.C. 304, 248 F.2d 626, *cert. denied*, 355 U.S. 875 (1957). Apropos of appellant's claim, this Court in *Simms* stated that the Supreme Court in *Jencks* v. *United States*, 353 U.S. 657 (1957), "did not

---

[16] See Memorandum and Order in the instant case filed September 27, 1963, at p. 2 (Judge Youngdahl).

[17] Brief for Appellant, 24.

intimate approval of unlimited examination into FBI files in the hope that something might turn up of benefit to the accused. As a matter of fact the Court made amply clear the continued prohibition upon judicial invasion of executive internal memoranda and reports." 101 U.S. App. D.C. at 308, 248 F.2d at 630.

II. The trial court did not err in denying appellant's motions for judgment of acquittal on several counts, nor in denying appellant's motion for mistrial.

(Tr. 75-85, 328, 350-351, 369-373, 455, 460-461, 798, 800, 805-807.)

The trial court's denial of appellant's motions for judgment of acquittal on various counts is fully justifiable both in law and on the evidence. The trial judge must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact (as well as assuming the truth of the Government's evidence and giving the Government the benefit of all legitimate inferences to be drawn therefrom), a reasonable mind might fairly conclude guilt beyond a reasonable doubt. Furthermore, if the judge concludes that either of two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide. *Bates* v. *United States*, 95 U.S. App. D.C. 57, 219 F.2d 30, *cert. denied*, 349 U.S. 961 (1955); *Thomas* v. *United States*, 93 U.S. App. D.C. 392, 211 F.2d 45, *cert. denied*, 347 U.S. 969 (1954); *Pritchett* v. *United States*, 87 U.S. App. D.C. 374, 185 F.2d 438, *cert. denied*, 341 U.S. 905 (1951); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947). Only when there is from the evidence no doubt that the verdict must be not guilty can the trial judge take the case from the jury. *Cooper* v. *United States*, 94 U.S. App. D.C. 343, 218 F.2d 39 (1954). If the evidence reasonably permits a verdict of acquittal or a verdict of guilt, the decision

is for the jury to make, and the appellate court should not disturb the finding of the jury. *Curley* v. *United States, supra.*[18] Review of the facts in this case indicates that the judge could not say from the evidence that there was no doubt that the verdict must be not guilty on the counts on which he denied the motions for judgment of acquittal. Essentially appellant's argument comes down to an issue that was simply and directly one of credibility which the judge properly left to the jury. *Cf. Bates* v. *United States, supra.*

With respect to the false pretenses counts, it is clear that the court's ruling on appellant's motions for judgment of acquittal was based on a precise knowledge of the essential elements, *i.e.*, a false representation, knowledge of its falsity, intent to defraud, reliance by the defrauded party, and obtaining something of value.[19] *Ciullo* v. *United States*, —— U.S. App. D.C. ——, 325 F.2d 227 (1963). Appellant states that an essential element is an "affirmative act" and apparently interprets this to mean that appellant must have expressly stated, "I am a doctor; I am a psychiatrist," in order to have made a false representation. See Brief for Appellant, 25-28. In addition to the trial evidence that appellant made the equivalent of such statements, the law provides that "it is not necessary, to constitute the crime of obtaining money by false pretenses, that the false representations, wilfully made by the defendant and in fact relied upon by [his] victim, should be direct, definite, and positive statements of fact. It is enough if the said false statements and representations are artfully and indirectly drawn, so that they are sufficient to deceive a person of ordinary intelligence . . . ." *Randle*

---

[18] The case of *Freidus* v. *United States*, 96 U.S. App. D.C. 133, 223 F.2d 598 (1955), cited at p. 32 of appellant's brief, is utterly inapposite to the facts of this case. The decision in *Freidus* was based on failure of evidence to show *materiality* of the representation, *knowledge* of falsity, and *criminal intent*.

[19] See the court's instructions to the jury, Tr. 949 *et seq.*

v. *United States*, 72 App. D.C. 368, 374, 113 F.2d 945, 951, *cert. denied*, 311 U.S. 683 (1940).[20]

Concerning count 2, the many express representations that appellant made to Mrs. Bale are set forth in the Counterstatement, *supra*, clearly showing several false representations that any reasonable person would construe, in essence, as meaning "I am a doctor and a psychiatrist." Count 4 (Schermerhorn) was discussed, in pertinent part, in treating the severance issue. See footnote 5, *supra*. Contrary to appellant's claim in his brief at p. 27 that Mrs. Sokol (Count 5) testified that "at no time had appellant made such a representation in her hearing" (*i.e.*, that he was a psychiatrist and medical doctor), she testified that appellant made such representations to her husband *in her presence* on their first visit (Tr. 328, 350-351). Mr. Sokol's testimony, corroborating that of his wife, is particularly meaningful in the context of his full conversation with appellant (Tr. 369-373). Also, appellant's conduct and use of signs, certificates and office procedure (*i.e.*, his assistant's pattern reference to him as "Doctor," "the Doctor") is relevant. The court properly utilized the legal principles stated above in leaving this count, and the determination of weight and credibility of the evidence, to the jury.

The distinction between count 6 (healing arts, James Athanas, judgment of acquittal denied) and counts 9, 11, and 16 (judgment of acquittal granted) is rooted in the evidence. The testimony on count 6 indicated preliminary diagnosis by appellant, concluding that the boy needed a great deal of help, extensive testing by appellant and a man who Mrs. Athanas was told was "a young medical student," indication of specific tests, and further diagnosis (Tr. 75-85). Comparable evidence was not provided on the other counts.

---

[20] Similar language may be found in *Partridge* v. *United States*, 39 App. D.C. 571 (1913), with respect to an "ambiguous and artfully worded" pamphlet. See *Skantze* v. *United States*, 110 U.S. App. D.C. 14, 288 F.2d 416, *cert. denied*, 366 U.S. 972 (1961) (twenty-seven count indictment with nine false pretenses counts; conviction on all such counts affirmed). The *Randle* case, *supra*, bears sufficient similarity to this case in facts and legal issues to deserve special notice.

The evidence offered on counts 10, 12, 15, and 17 was ample to withstand a motion for judgment of acquittal, since the evidence indicated appellant held himself out (or allowed himself to be held out) as ready to do (or attempt to do) the acts specified in 2 D.C. Code § 101: preventing, relieving, correcting, or curing, or of attempting to prevent, relieve, correct, or cure any disease. Since the act is violated by the *holding oneself out* as performing or *attempting* to perform the specified acts, it is not necessary to prove the specific nature of the medication offered, nor indeed that it had any therapeutic value. If there is any inconsistency between these counts and count 16, on which judgment of acquittal was granted, the inconsistency was to appellant's advantage.

The evidence in the Government's case in chief showed appellant's physical possession of dangerous drugs in his office (Tr. 455, 460-461, and testimony of the complaining witnesses; see Counterstatement, *supra*), and there was no basis for the judge to believe, when he ruled on the motions for judgment of acquittal, that such possession was not appellant's simply because evidence indicated that a medical doctor had obtained a license using appellant's office address.[21] Appellant's tortured presentation of the documentary and oral evidence at pp. 30-31 of his brief is best rebutted by referral to the evidence of each witness. The judge committed no error in denying appellant's motions for judgment of acquittal on these counts.

Appellant's mistrial motion was properly denied because the question objected to by appellant was pertinent for *impeachment* purposes, was not offered as evidence against appellant, and, in any event, was not prejudicial to appellant's substantial rights. The defense witness, Dr. Link, testified on direct examination that he referred Mr. Nelson to appellant "as a psychologist. *I have always known him as a psychologist* [emphasis added]," and he stated he knew the difference between a psychologist and a psychia-

---

[21] In rebuttal, the Government showed that the medical doctor simply used appellant's address to obtain his D.C. license, but *in no sense* occupied the office or practiced from there or had medical supplies there (Tr. 805-807).

trist and a medical doctor (Tr. 798). When asked if he ever referred people to appellant as a medical doctor, he said "No, I couldn't have" (Tr. 798). On cross-examination, preliminary questions established that Dr. Link was very familiar with the booklet shown him by Government counsel and that he had seen the index page of the booklet. It is impossible to ascertain the specific nature of the questions Government counsel would have posed, because the next question merely asked if the witness saw appellant's name in the index, calling for a yes or no response, but answered at length by the witness (Tr. 800). Based on the preliminary answers of the witness it was proper for the Government (having shown that the witness was familiar with a publication that represented appellant as an "M.D.") to show that the witness had reason to believe appellant to be an M.D. or knew that appellant was held out as an M.D., either of which facts would reflect on the credibility of his direct testimony and thus be admissible for impeachment. There was no effort by the Government to link appellant to the booklet as responsible for the entry, nor to show any connection between that booklet and the counts and evidence in the case. Coupling this with the response of Dr. Link that Dr. Miller (not appellant) edited the booklet, that he, Link, complained about the entry of "M.D." after appellant's name, that he had nothing to do with editing that issue (indicating Link recognized an impeachment effort), and that such entry was a typographical error or stupidity, it is not likely that the volunteered testimony of the defense witness was unduly prejudicial. It should be noted that defense counsel made no motion to strike the question and the answer. In the fact of the sum total of substantial evidence for each count of false pretenses, particularly the *express words* of the *appellant himself* as reported by several witnesses, it is most improbable that this one unrelated incident could have been of any consequence to the jury. Placing this one incident in the context of the entire trial, it is clear that appellant's substantial rights were not prejudiced so as to have required granting of a mistrial.

III. The trial court's participation in the case was reasonable and proper in the circumstances of the case under applicable principles of law.

(Tr. 196, 222, 238, 240, 242, 440-405, 546-547, 554, 561, 926-927, 936 *et seq.*)

The trial court did not intervene, as appellant claims (Brief for Appellant, 34), "almost constantly, and almost always on behalf of the prosecution," nor was the appellant prejudiced by the court's conduct of the trial. When a claim such as this is made, the appellate court must examine the context of the entire record, lest there be any distortion by appellant's singling out of specific instances of trial court activity and magnifying them into alleged error. *Glasser* v. *United States,* 315 U.S. 60, 83 (1942); *United States* v. *Thayer,* 209 F.2d 534, 536 (7th Cir. 1954). Interrogation is within the trial court's "power to elicit the truth by an examination of the witnesses," and the extent of such examination is within the sound discretion of the trial court so long as the substantial rights of appellant are not prejudiced. *Glasser, supra* at 82-83. A federal trial judge is not a mere moderator but is the governor of the trial who may, besides examining witnesses, guide and assist the jury in its consideration of the evidence. He may explain and comment on evidence, calling attention to parts of the evidence he thinks important, and in exceptional cases he may even express his opinion upon the evidence. *Quercia* v. *United States,* 289 U.S. 466 (1933); *Billeci* v. *United States,* 87 U.S. App. D.C. 274, 282, 184 F.2d 394, 402 (1950). The trial court's activity was well within the scope of these principles. Even a casual glance at the record would indicate that the trial was long and the witnesses and issues many such that a trial court properly sought a presentation of that which was specific, pertinent and clear. Notwithstanding this, appellant argues that the trial court erred by examining witnesses on the *essential elements* of the offense! (See Brief for Appellant, 33.) The trial court is properly interested in seeing that all *salient facts* are presented to the jury. *Carrado* v. *United States,* 93 U.S. App. D.C. 183, 210 F.2d 712 (1953),

cert. denied, 347 U.S. 1018 (1954). Also amazing is the fact that, with the exception of Dr. Savarese, all of the examples of court "intrusion" cited by appellant in Section IV of his brief involved Government witnesses who were, in most cases, being examined by Government counsel. Many of the references cited by appellant involve questions by the court patently intended to clarify previous comments of witnesses that were general and possibly ambiguous to the jury (*e.g.*, Tr. 196, 222, 238, 242, 554). Some of the cited examples involve questions from the court so cast as to be clearly beneficial to appellant: *e.g.*, "This didn't convey to you that he was a doctor of medicine, did it?" (Tr. 196); to a Government witness: "You weren't in the room with him? You don't know what happened" (Tr. 223); likewise, "The certificate doesn't say anything about interning" (Tr. 240).

We have already treated the Sokol cross-examination limitation to which appellant refers at p. 33 of his brief, citing Tr. 778-779; see footnote 5, *supra.* The court's questioning of defense counsel, during Government examination of the passport witness (Tr. 440-445), was an effort by the court to clarify defense counsel's objection to the witness' response to a question. It was the conclusion and statement of appellant's counsel that the court had put appellant in a bad light, to which the court immediately replied he had no intention of putting appellant in a bad light, and ultimately the court seems to have conceded defense counsel's argument on the objection. The trial court's examination of Dr. Savarese was not hostile but probing, since the witness testified about an alleged threat made to him, and the court sought to clarify an ambiguous use of the term "psychiatrist" in a letter he had written on behalf of appellant (Tr. 546-547). The so-called "flare-up" occurred while the court examined the witness about his tenuous and brief relationship with the American Association for Social Psychiatry, when the defense counsel accused the court of implying that the organization was fictitious. The court flatly denied this and stated it simply sought to verify when the organization was founded and

if it still existed (Tr. 561). Appellant made no claim at the time of the questioning that the court's demeanor, intonation or gestures were improper (and makes no such claim now),[22] and the trial record indicates no hostility or impropriety even in this one incident. The result cited by appellant in the case of *Jackson v. United States*, —— U.S. App. D.C. ——, 329 F.2d 893 (1964), was based on an examination of the entire transcript of trial. Such a result in the instant case would be unfounded, based on a review of the trial transcript.[23]

The court properly refused to grant appellant's request that 33 D.C. Code §§ 703 and 704 be read to the jury (Tr. 926-927). Section 703 specifically applies to drug compounds which are not dangerous drugs, whereas appellant had stipulated that the drugs involved in the counts submitted to the jury were dangerous drugs. Section 704 has reference to the delivery or possession of dangerous drugs by persons specified in the section, or their agents, "for use in the normal or usual course of their business or practice or in the performance of their official duties." There was no evidence that the drugs in appellant's possession came under the quoted specification, while there was evidence to the contrary. Hence the court did not remove any proper factual issue from the jury by its denial.

There was no error due to the judge's participation in this case. (See court's instructions to the jury on their role and on his role, Tr. 936 *et seq.*)

---

22 See *Billeci* v. *United States, supra.*

23 There is no indication in the *Jackson* opinion of how that case can possibly be compared with the case at bar. *United States* v. *Marzano*, 149 F.2d 923 (2d Cir. 1945), and *United States* v. *Meltzer*, 100 F.2d 739 (7th Cir. 1938), both cited by appellant, involve abuses that are absurdly unrelated to appellant's case.

IV. The trial court properly admitted documents under Rule 27, Federal Rules of Criminal Procedure, and, if there was any error, it was not prejudicial to appellant's substantial rights.

(Tr. 411, 425-428, 436.)

The documents to which appellant takes exception in Section IV of his brief at p. 37 were offered by the Government under the provisions of Rule 27, F.R. Crim. P., which incorporates by reference Rule 44, F.R. Civ. P., to establish the falsity of certain representations made by appellant. The testimony of Government witnesses indicated that appellant, *besides* representing that he was a psychiatrist and a medical doctor, represented that he had received training at Oxford University, England, that he had interned at Sir Guys Hospital, London, England, that he had studied at Faculiti Berni, Austria (other witnesses saw a University of Bern certificate, indicating a degree from the university in Switzerland), and made other representations. The principal false representation charged was that appellant claimed to be a psychiatrist and medical doctor, and there was ample evidence that such representation was made. Proof of *that representation* was fully sufficient to sustain a conviction for false pretenses, and it was not necessary that the Government prove *all* false representations made by appellant. However, the Government was entitled to offer proof showing that all such representations by appellant were false, as charged.

Proof of a lack of record of attendance by appellant, with respect to Oxford University, fully complied with the requirements of the Federal Rules. The rules do not require that the affiant testify or be subject to cross-examination.[24] There is no reason for appellant's inference that all pertinent records were not searched.

---

[24] *Cf. Rademacher* v. *United States*, 285 F.2d 100 (5th Cir. 1960). Neither *Bussie* v. *United States*, 81 A.2d 247 (D.C. Mun. Ct. App. 1951), nor *Shore* v. *United States*, 61 App. D.C. 18, 56 F.2d 490, *cert. denied*, 285 U.S. 552 (1932), is pertinent to proof under Rule 27, or is authority for the proposition stated by appellant in his brief at p. 38.

Contrary to appellant's statement that he had no opportunity to bring out certain information about the evidence thereon (Brief for Appellant, 37), he made no attempt to bring out such information, save here on appeal (Tr. 411, 425-428). The relevance of all of the documents is clear from the evidence of appellant's representations (*e.g.*, that he interned at Sir Guys Hospital in London, and that he studied at Bern, Switzerland; see Counterstatement, *supra*).

Appellant attacks the certificate of the President of the Canton of Bern, Switzerland, because it does not appear to appellant that such person was custodian of the relevant records and the certificate does not state whether appellant ever studied at the university or received a degree there (Brief for Appellant, 38). Yet appellant acknowledges that the Government introduced a certification from the Secretary of the Dean of the University of Bern who attested, "We have been unable to find the name of Vincent Daly anywhere in our records" (Tr. 431), which cannot be attacked as incomplete.

The custodian of the records at Sir Guys Hospital, London, attested that appellant held no position there according to the records, admitting that the records were incomplete. The incompleteness of the records is a matter of weight and does not invalidate the document as evidence. *Curacao Trading Co.* v. *Federal Ins. Co.*, 50 F. Supp. 441 (S.D.N.Y. 1942), *aff'd*, 137 F.2d 911 (2d Cir. 1943), *cert. denied*, 321 U.S. 765 (1944). Appellant objected to the statement of the affiant in that document that during the five years for which the records were incomplete he held a senior appointment, knew all the house officers well, and had no recollection of appellant. Assuming that this is objectionable as hearsay, the statement only indicates the affiant's recollection and does not state that appellant was not at the hospital during that time. Nevertheless, the admission of this matter can hardly constitute reversible error in view of the superabundance of evidence of more crucial false representations (*i.e.*, psychiatrist and medical doctor) which fully supports the verdict of guilty.

V. The trial court properly denied appellant's request to offer evidence on his "habit" of not misrepresenting himself to other patients, which was irrelevant.

(Tr. 572, 577-578, 591-592, 630.)

The appellant was not charged with a scheme to defraud, nor was the case tried on that basis, but rather with five distinct crimes of false pretenses, separately proved. The fact that there were five such counts neither implies that there were other parties whom appellant defrauded nor that there were other patients whom appellant did not defraud. The evidence indicated that all complainants went to appellant for *psychiatric* help, that appellant realized that *psychiatric* help was sought, that appellant by his representations induced their belief and reliance on his claim of being a *psychiatrist* and medical doctor, and they would not have submitted to his care if they had known he was not a *psychiatrist.* On the other hand, appellant sought to show "habit" by offering several witnesses who would testify that appellant did not represent he was a psychiatrist or medical doctor to them. Appellant's offer was clearly irrelevant and non-probative even from analysis of the testimony of the witnesses he did examine for that purpose (Tr. 572, 577-578, 591-592, 630). The witnesses he called indicated that they *knew* he was *not* a psychiatrist and that they did not go to him for psychiatric help, but knew he was a psychologist or counsellor. Hence in these circumstances (substantially diverse from those applicable to the case) there is nothing probative about appellant's failure to misrepresent himself to such other persons.

The recent case of *Levin* v. *United States*, —— U.S. App. D.C. ——, —— F.2d —— (No. 18024, decided June 30, 1964), settles the applicable legal issues that appellant raises. The Court noted that "according to the weight of authority, evidence of the general habits of a person is not admissible for the purpose of showing his conduct upon a specific occasion" (slip opinion at 10) (footnote omitted). Although appellant's proffer of evidence would not be probative, assuming *arguendo* that it had

some probative value, this Court has indicated that the probative force may not outweigh the inconvenience of a multitude of collateral issues ("habit" being an inference from many acts, each presenting an issue to be tried and examined) resulting in consuming much time, and tending toward confusion and distraction from the main issues (slip opinion at 11). The Court also noted that the probative force of habit, whether in a civil or criminal case, is based primarily upon the fact that habitual conduct is *largely free from the complicating and confusing elements of volition, i.e.,* is of an *automatic nature,* such that its probative force is in proportion to the extent to which it assumes this automatic character. Slip opinion at 12, citing 4 CHAMBERLAYNE, MODERN LAW OF EVIDENCE, § 3203 (1913). What appellant offers to prove by his "habit" witnesses are the representations, statements (or lack thereof) and behavior of appellant as to other patients, which patently pertain to *volitional* acts and statements, and not to "conduct in line with the activities of the body which are under the control of the subliminal mind, *i.e.,* are of the automatic nature . . ." *Ibid.* Thus appellant's offer of proof would not be probative, in the circumstances, would have unduly hampered the proper evidence, and was properly within the discretion of the trial court to deny.

VI. The trial court did not err in denying appellant access to the probation report.

(Supp. Tr. 2.)

Appellant contends that his right of allocution at sentencing entitled him to see the probation report, or a summary thereof, because he believed such report would contain many inaccuracies, as evidenced by appellant's document filed with the court. This document, prepared under the auspices of an association with which appellant was affiliated and apparently, in good measure, by his assistant, Miss Hallman, purported to demonstrate numerous errors and inconsistencies in records available about appellant. Appellant desired this information so

that he could supply additional information to the court, presumably to rebut or supplement the probation report. The trial judge denied appellant's request to see the probation report, which is confidential, and stated that in sentencing his primary concern was the charges of which appellant was convicted (Supp. Tr. 2). As a matter of fact, appellant was sentenced to one to three years, which is the maximum for only one felony count, whereas he could have received, on the four felony convictions alone, up to twelve years of imprisonment.

It should be noted that none of the cases cited by appellant has any reference to pre-sentence investigation and report (Brief for Appellant, 42). It is well settled that the appellate function does not ordinarily involve review of discretion in the area of sentencing, especially when the sentence is within the statutory maximum, as it well is in this case. *Leach* v. *United States*, —— U.S. App. D.C. ——, 334 F.2d 945, 951 (1964); see *id.* at 958-959 n. 22 (dissenting opinion). Also there is strong authority supporting the confidentiality of probation reports such that a defendant has no due process right to confront or cross-examine witnesses on the content of such reports, nor to have open-court testimony or to retry collateral issues raised by the contents of probation reports, which is in essence what appellant seeks. *Williams* v. *New York*, 337 U.S. 241, 246-247, 250 (1949); *United States* v. *Durham*, 181 F. Supp. 503 (D.D.C.), *leave to appeal denied*, Misc. No. 1438, order dated April 11, 1960, *cert. denied*, 364 U.S. 854 (1960). The language of Rule 32(c), F.R. Crim. P., concerning presentence investigation makes clear that the report is for the *court* and any disclosure thereof is in its discretion. There is no evidence that the trial court abused its discretion in the instant case. The trial court stated that the sentence imposed resulted *primarily* from the offenses committed (we submit that even on consideration only of the reprehensible nature of the crimes of which appellant was convicted, he received a light sentence); furthermore, it is not reasonable to infer that the trial court was informed that appellant had a

criminal record in a dozen states or that the court received a thousand pieces of misinformation (as appellant theorizes at p. 43 of his brief), in view of the moderate sentence imposed. Neither the trial court nor the appellate court has, we submit, any reason to infer that the probation report was anything but objective, exhaustive and accurate. On the other hand, the only source of alleged misinformation in various records comes from a source obviously partial to and interested in exculpating the appellant. The reliability of their report is not self-demonstrating but would require considerable time and investigation for verification. This would require, in essence, a whole new trial of the many fact representations in which appellant claims a conflict.

Appellant's right of allocution was fully honored as both he and his counsel were given opportunity to make any statement they chose to make before sentence. In fact, very little was offered on appellant's behalf, except for relying on the information in the document which appellant says set forth "in some detail such errors as had been discovered and could be documented". Brief for Appellant, 43. It appears from this statement that the document contains *all* errors or discrepancies known to appellant and which he can substantiate, and thus appellant can hardly claim that he was denied an opportunity to advise the court fully of known relevant inconsistencies or errors in records of appellant's background as well as to represent what appellant considered to be the truth. Finally, the trial court had appellant's document of alleged errors, prior to sentencing, available for its perusal and for comparison with the probation report. There is no basis to assume the trial court used bad judgment in evaluating the probation report *vis-à-vis* the appellant's document.

Considering the nature of the crimes committed, the sentence imposed as compared with the maximum possible sentence, the court's primary reliance on the crimes committed in imposing sentence, appellant's full opportunity to exercise his right of allocution before sentence, the

availability to the trial court of appellant's document of errors of record, and the broad discretion vested in the trial court as to sentence and pre-sentence investigation, there is no valid ground for appellate review.

In sum, the conviction may stand if at least one felony count is legally sufficient and free of reversible error, because the appellant's sentence was no more than the statutory penalty provided for one such felony violation.

A review of the evidence and of the conduct of the trial substantiates the Government's argument that *all* counts were established by the evidence and free of reversible error.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
PAUL A. RENNE,
Assistant United States Attorneys.

EDWARD J. PESCE,
Attorney, Department of Justice.

☆ U. S. GOVERNMENT PRINTING OFFICE 1964—746430/P.O. 287